Dec. Term 1895. No. 447.

Brief of Hitchcock for P. in E.

DEC 30

Supreme Court U.S.

BRIEF FOR PLAINTIFF IN ERROR.

Filed Dec. 30, 1895.

Supreme Court of the United States.

OCTOBER TERM, 1895.

THE STATE OF MISSOURI EX REL. THE LACLEDE GAS LIGHT CO.,
Plaintiff in Error,
vs.
MICHAEL J. MURPHY, STREET COMMISSIONER OF ST. LOUIS, AND THE CITY OF ST. LOUIS,

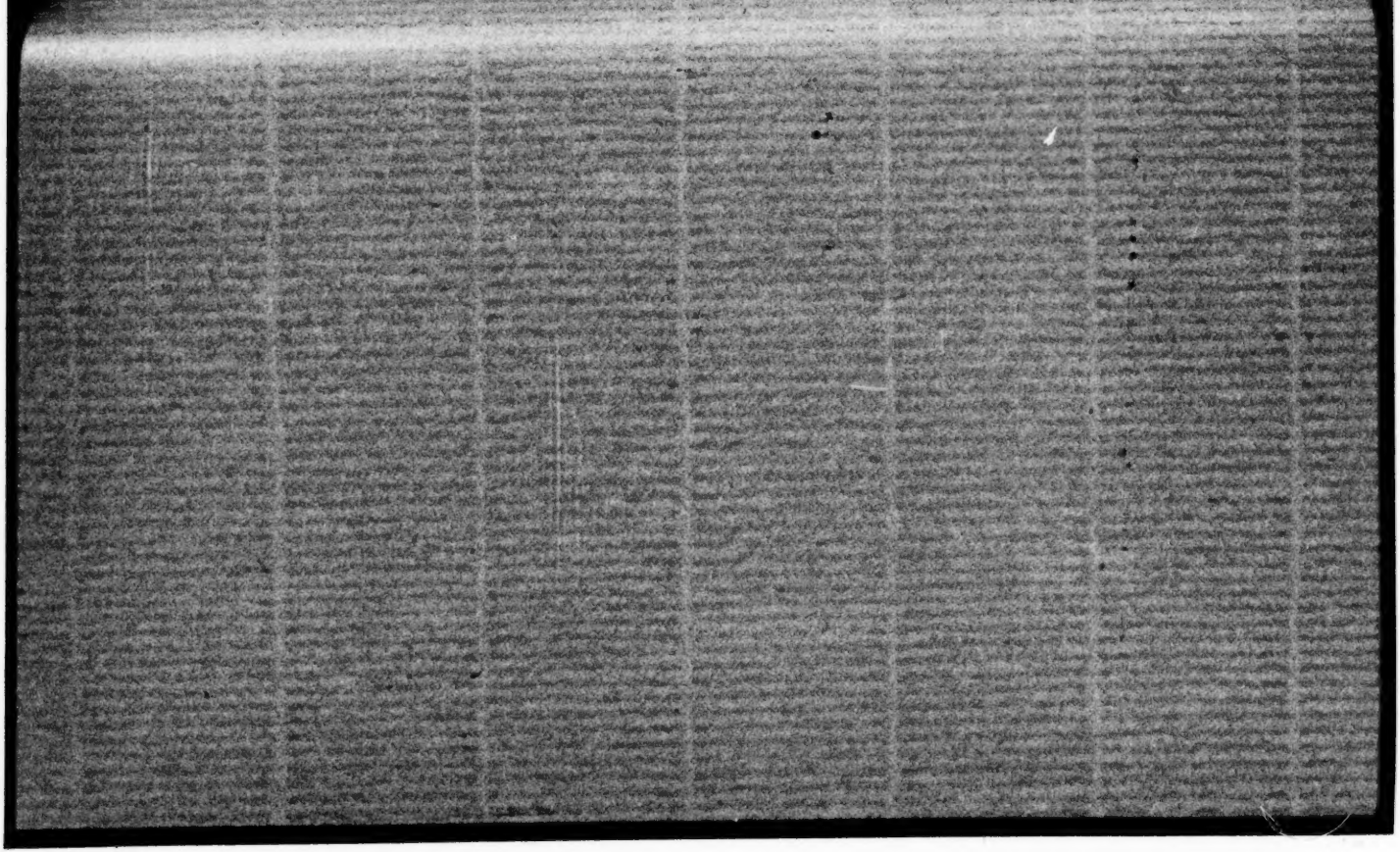
No. 447.

IN ERROR TO THE SUPREME COURT OF MISSOURI.

Brief and Argument of

HENRY HITCHCOCK,

for Counsel for Plaintiff in Error.



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IN THE

Supreme Court of the United States.

OCTOBER TERM, 1895.

THE STATE OF MISSOURI *ex relatione* THE LACLEDE GAS-LIGHT COMPANY,
Plaintiff in Error,

vs.

MICHAEL J. MURPHY, STREET COMMISSIONER OF THE CITY OF ST. LOUIS, AND THE CITY OF ST. LOUIS,
Defendant in Error.

No. 667.

STATEMENT OF CASE FOR PLAINTIFF IN ERROR.

(The references are to the pages of the printed record.)

This was an original proceeding in the Supreme Court of Missouri[1] by the Laclede Gas Light Company, relator, plaintiff in error, for a peremptory writ of mandamus against Michael J. Murphy, Street Commissioner of the City of St. Louis: to which the City of St. Louis afterwards also became a party respondent, its appearance being entered by consent of parties and leave of court.[2]

[1] Printed Record, p. 4.

[2] Id., p. 60.

Proceedings in the Cause.

On November 26, 1894, relator filed its petition in said court [1] for a writ of mandamus, to issue against Michael J. Murphy, Street Commissioner of the City of St. Louis,[2]—

"commanding him to issue a permit to the relator to make an excavation along the east side of Broadway, [one of the public streets of said city,] as near the curb as practicable, and extending from the southeast corner of Mound Street and Broadway to the southeast corner of Olive Street and Broadway, in so far as such excavation may be necessary for the purpose of laying relator's electric wires underground, the same to be done with as much dispatch and as little inconvenience to the public as possible."

On December 10, 1894, an alternative writ was issued by Division No. 1 of said Supreme Court [3] in accordance with the prayer of said petition, returnable on January 14, 1895,[4] on which day respondent filed his return, showing cause against the issue of a peremptory writ.[5] On January 24, 1895, relator filed its special demurrer to certain parts,[6] also its motion to strike out other parts, of said return,[7] which were set down for argument on February 18, in Division No. 1 of said Court; but on that day said cause was transferred by the court, on its own motion, to the Supreme Court *in banc*, where said demurrer and motion were argued and submitted on March 19.[8] On June 18, final judgment was rendered, denying the peremptory writ prayed for by relator, upon the grounds stated in the opinion of the court:[9] but on June 25, on motion of relator, said judgment was set aside, said demurrer and motion to

[1] Id., p. 4.
[2] Id., p. 9.
[3] Id., p. 17.
[4] Id., p. 23.
[5] Id., pp. 24–28.
[6] Id., pp. 29–32.
[7] Id., pp. 32–36.
[8] Id., p. 36.
[9] Id., p. 37.

strike out being overruled, and leave granted relator to plead further.[1]

On June 28 relator filed its reply to respondent's return;[2] to which, on June 29, respondent filed a general demurrer, also specially demurring to certain parts thereof:[3] and on July 1 the City of St. Louis, being made a party respondent by consent of parties and leave of court, entered its appearance in said cause and adopted as its own the return of respondent to the alternative writ, and respondent's demurrer to said reply.[4] On July 2, without further argument, the court made an order in said cause sustaining the demurrer of said respondents to relator's reply to the return of said respondents, "for the reasons given in the opinion heretofore rendered in this cause, to which reference is hereby made as part of this judgment."[5]

Relator thereupon declining in open court to plead further, final judgment was entered on July 2, 1895, denying the peremptory writ prayed for. On the same day, July 2, a writ of error from this Court to reverse said judgment, sued out by relator, was allowed and citation signed by the Honorable Theodore Brace, Chief Justice of said Supreme Court of Missouri;[6] due service of said citation being on the same day acknowledged for both said respondents by their attorney of record.[7] A supersedeas bond tendered by relator having been filed and approved[8] on July 6, on which day relator also filed its assignment of errors,[9] the clerk of said Supreme Court of Missouri made due return to said writ of error on July 12, and on July 24, 1895, the transcript in said cause was filed and docketed in this Court.

[1] Id., p. 46.
[2] Id., pp. 46–58.
[3] Id., pp. 58–60.
[4] Id., p. 60.
[5] Id., p. 61.
[6] Id., p. 62.
[7] Id., p. 1.
[8] Id., p. 62.
[9] Id., p. 3.

Pleadings: Opinion and Judgment.

Following is a summary of the pleadings in said cause.

Relator's petition

Avers[1] that relator was duly incorporated by an Act of the General Assembly of Missouri approved March 2, 1857, subsequently amended by an Act approved March 3, 1857, and an Act approved March 26, 1868, which Acts are respectively in the words and figures following.

An Act to incorporate "The Laclede Gas Light Company."

Be it enacted by the General Assembly of the State of Missouri, as follows:

§ 1. James M. Hughes, Edward Bredell, Robert Holmes, John C. Rust, Charles Gibson, Samuel H. Gardner, Henry A. Clover, and Archibald Gamble be, and they are hereby created and constituted a body politic and corporate, by the style of "The Laclede Gas Light Company," and by that name they and their successors and assigns shall have perpetual succession, may contract and be contracted with, sue and be sued, and may also hold and convey, or otherwise manage and dispose of such property, real, personal and mixed, as may be necessary for the purposes of said corporation and the prosecution of its legitimate business.

§ 2. The capital stock of said company shall be fifty thousand dollars, and the same may be increased to two million dollars, which shall be divided into shares of one hundred dollars each.

§ 3. The affairs of said company shall be conducted by a board of not less than five directors, and such officers and agents as they may deem necessary, said directors to be chosen annually by the stockholders, each share of stock being entitled to one vote in such election, and they shall hold their offices for one year, and until their successors

[1] Pr. Rec., p. 17.

are elected and qualified; said directors shall have power to ordain and make all needful by-laws, rules and regulations, for the transaction of the business of said company, and under the direction of the stockholders, may have absolute power over all the property and effects of said company. They may also fill vacancies in their board until the next regular election.

§ 4. The said corporators, or a majority of them, may at any time, open books in the city of St. Louis for subscription to the capital stock of said company, and, upon the sum of fifty thousand dollars being subscribed, may organize said company under this charter.

§ 5. The said company, its successors and assigns, shall within all that portion of the present corporate limits of the city of St. Louis, in St. Louis County, not embraced within the corporate limits of said city, as established by the act entitled "An Act to incorporate the city of St. Louis," approved February 8, 1839, have and enjoy, during the continuance of this act, the sole and exclusive privilege and right of lighting the same, and of making and vending gas, gas-lights, gas-fixtures, and of any substance or material that may be now or hereafter used as a substitute therefor; and to that end, may establish and lay down in said portion of said corporate limits, all pipes, fixtures, or other thing properly required, in order to do the same (the same to be done with as much dispatch and as little inconvenience to the public as possible), and shall also have all other powers necessary to execute and carry out the privileges and powers hereby granted to said company.

§ 6. The city of St. Louis and said company may make any contracts they may deem to their mutual advantage, in regard to the lighting of any parts of said portion of said corporate limits, or any other thing relating to the business and affairs of said company. The said city shall have the right at the expiration of twenty years from the time of the organization of said company, under this charter, to purchase all the property and effects of the same, paying therefor to the same the value of such property and effects, with twenty per cent added thereto, such value to be fixed by two appraisers, one to be chosen by

the city and the other by the company, and if they cannot agree, then the two thus chosen shall nominate a third man, and a decision of any two of the three shall be binding; and upon such purchase being made, all such property and effects, and all rights and privileges granted to said company shall immediately pass to and vest in said city. If said city fail so to purchase said property and effects, then this charter shall be and the same is hereby renewed and extended for the further period of thirty years after the expiration hereof.

§ 7. Any person or body corporate who shall, within said portion of said corporate limits, interfere with the privileges hereby granted to said company, or exercise like acts or privileges, shall, for every such offense, forfeit and pay to said company one thousand dollars, and each day's continuance of such offense shall be construed to be, and be, a new offense, under this section.

§ 8. The said company and this act is hereby exempted from the operation of sections 6, 7, 13, 14, 15, 18, and 20, of article first of the act entitled, "An Act concerning Corporations," approved November 23, 1855.

§ 9. This act shall take effect from its passage, and shall continue in force for thirty years.

Approved March 2, 1857.

An Act supplementary and amendatory of an act entitled "An Act to incorporate the Laclede Gas Light Company."

Be it enacted by the General Assembly of the State of Missouri, as follows:—

§ 1. The act to which this act is amendatory is hereby amended as that the words "sole and exclusive," in the fifth section of the act are stricken out.

§ 2. The city of St. Louis shall not be compelled, in any purchase which it may make under the sixth section of the before recited act, to pay more than the appraised value of the property and effects of the corporation created by said act, without any addition of percentage.

This act to take effect and be in force from and after its passage.

Approved March 3, 1857.

An Act to amend an act to incorporate The Laclede Gas Light Company, approved March 2, 1857.

Be it enacted by the General Assembly of the State of Missouri, as follows: —

Section 1. The said Laclede gaslight company shall and may, within the corporate limits of the city of St. Louis, as the same are now or may hereafter be established, exercise, have, hold, and enjoy forever, all the rights, privileges, and franchises granted to it by the fifth section of the act to which this act is amendatory, and may at any time lease, sell or dispose of any portion of said rights, privileges and franchises to individuals, associations or corporations, intending or desiring to exercise the same within any portion of the limits aforesaid.

Sec. 2. The capital stock of said company may be increased from time to time to such amount as may be necessary to carry on its business.

Sec. 3. Nothing in this act contained shall be construed as affecting the vested rights of the St. Louis gaslight company; and the sixth section of the said act to which this act is amendatory, is hereby repealed.

Sec. 4. An act entitled an act supplementary to and amendatory of an act entitled an act to incorporate the Laclede gaslight company, approved March 3, 1857, is hereby repealed.

Sec. 5. This act shall take effect from its passage.

Approved March 26, 1868.

That said Act of March 2, 1857, so amended, constitutes relator's charter, under which it has organized and carried on business and which is in full force:

That by said charter relator is granted

— "the privilege and right of lighting the city of St. Louis throughout its corporate limits and of making and vending gas, gas lights, gas fixtures, and any substance or material that may be now or hereafter used as a substitute therefor; and to that end may establish and lay down in any portion of said corporate limits all pipes, fixtures, or

other thing properly required in order to do the same, with this limitation only, that in laying down pipes, fixtures or other thing properly required therefor, relator shall do the same with as much dispatch and as little inconvenience to the public as possible."

That by said charter relator is invested with all other powers necessary to execute and carry out the privileges and powers so granted; but that on February 28, 1873, there was executed by and between the city of St. Louis, the St. Louis Gas Light Company and this relator, an agreement, known as the "Tripartite Agreement," in and by which relator abandoned and surrendered all *exclusive* rights and all claim to any *sole or exclusive* right of lighting said city, &c., under its charter.

It is further averred,—

Relator further states that in pursuance of the terms of said charter it has for a long time past been engaged in the lighting business, both by gas and electricity; that under a contract with the city of St. Louis it is lighting a part of the public streets and alleys of said city by electricity, and will be obliged to do so for a number of years to come; that it is furnishing light by means of gas or electricity to many thousand private consumers in said city, being a large part of the inhabitants thereof; that in order to fulfill its obligations to the city and the public under its charter it has erected and maintains extensive and costly plants for the manufacture and distribution of gas as well as for generating and distributing electric currents; that for distributing gas it has from time to time constructed and maintained and now maintains a system of pipes laid under ground along the streets of the city of St. Louis as it was at all times authorized to do by its said charter, nor has the city of St. Louis ever objected to its so doing or disputed relator's right to do so; that for the distribution of electricity relator has hitherto used overhead wires strung upon poles along the streets and alleys of said city, which poles and electric

wires have been and are maintained and used by relator without objection by said city or the authorities thereof, for the distribution of electricity, as well to furnish light to private consumers as for the fulfillment by relator of its said contract with said city of St. Louis for the lighting by electricity of certain public streets and alleys thereof; that to effect such distribution it is necessary to transmit through and by means of said wires electric currents of great power, which if and when accidentally diverted are dangerous to human life and property; that in order to avoid the increasing inconvenience and danger to the public necessarily incident to that method of distributing electric currents and in order to provide more effective and proper service, relator has made arrangements to lay its wires underground along and under the streets of said city, according to approved and practicable plans and is now ready to do so with as much dispatch and as little inconvenience to the public as possible.

That respondent Murphy is Street Commissioner of the City of St. Louis, having, as such, the supervision and control of the streets and alleys of said city and the enforcement of city ordinances relating thereto.

That on October 30, 1894, having given notice thereof to said Street Commissioner (respondent), relator began the work of excavating at a point on Broadway, a public street in said city, near Mound street, adjacent to relator's generating plants, which work was proper and necessary for laying its wires underground: but respondent stopped said work and caused relator's men to be arrested, notifying relator that he would not allow any part of any street to be excavated for any purpose without a permit previously obtained from him as required by ordinance.

That by Section 568, Article I, Chapter XV, Revised Ordinance, 1887, of the City of St. Louis, it is provided that —

"No person shall make or cause to be made any excava-

tion on any public street, highway or alley, without written permission of the street commissioner so to do excepting public work done under the authority of the water or sewer commissioner, who at the time of ordering any such excavating shall notify the street commissioner of the same."

That relator then applied to respondent, as Street Commissioner, for a permit to make such excavation, so that it might lay its wires under ground for the purposes aforesaid and in pursuance of its charter rights and privileges; but respondent arbitrarily and unlawfully refused and still refuses to issue to relator any permit to excavate any part of any street of said city for said purpose, or to permit relator to make any such excavation without a permit, and threatens to cause the arrest of any person who may begin any such excavation for said purpose of laying any wire of relator's under ground; so that relator has been and is by said street commissioner absolutely prevented from exercising one of its vested rights granted by the State of Missouri and hitherto exercised by relator without let or hindrance, viz.: to lay down in the streets of St. Louis all pipes, fixtures, or other thing properly required, in order to carry on the business for which relator's corporation was organized.

That it was and is the duty of respondent, as such Street Commissioner, to issue such permit to relator, so that relator may, without interference by the police or other authorities of said city, exercise its charter powers and rights in that behalf above mentioned.

That by reason of the premises, relator is without other remedy, and therefore prays—

That a writ of mandamus may issue against said Michael J. Murphy, street commissioner of the city of St. Louis, commanding him to issue a permit to the relator to make

an excavation along the east side of Broadway as near the curb as practicable and extending from the southeast corner of Mound street and Broadway to the southeast corner of Olive street and Broadway, in so far as such excavation may be necessary for the purpose of laying relator's electric wires under ground, the same to be done with as much dispatch and as little inconvenience to the public as possible. And relator prays for such other process, orders and remedies as may to the court seem meet and proper.

Respondent's return

Admits[1] that by said Act of March 2, 1857, amended by said Act of March 3, 1857, relator became a body corporate, and that the General Assembly of Missouri passed said Act of March 26, 1868; the several provisions of said Acts being set out in said return; but avers[2] —

That said Act of March 26, 1868, is unconstitutional, null and void, and in conflict with Section 2, Article VIII of the Constitution of Missouri of 1865, which provides as follows:—

"No law shall be passed reviving or re-enacting any Act heretofore passed, creating any private corporation, where such corporation shall not have been organized and commenced the transaction of its business, within one year from the time such Act took effect, or within such other time as may have been prescribed in such Act for such organization and commencement of business."

That relator did not within one year from the time the Act of March 2d, 1857, took effect, organize, neither did it commence the transaction of its business within one year after the said Act of March 2nd, 1857, took effect, but, on

[1] Id., p. 24. [2] Id., p. 25.

the contrary, said Laclede Gas Light Company did not commence business until the year 1873; and therefore that the Act approved March 26th, 1868, was in conflict with said Section 2, Art. 8, of the constitution of 1865; and respondent further avers that said Act of March 26, 1868, was an act reviving and re-enacting the Act of March 2, 1857.

Also that said Act of March 26, 1868, is null and void and in conflict with Section 25 of Article IV of the Constitution of Missouri of 1865, which is as follows:

"No Act shall be revived or re-enacted by mere reference to the title thereof; nor shall any Act be amended by providing that designated words thereof shall be struck out, or that designated words shall be struck out and others inserted in lieu thereof; but in every such case the Act revived, or re-enacted, or the Act or part of Act amended, shall be set forth and published at length, as if it were an original Act or provision."

Also that the charter of the relator by the terms of Section 9 of the Act of March 2, 1857, expired on March 2nd, 1887, and that relator therefore is not entitled to any of the privileges, rights, or franchises claimed by it:

Also, for further and separate return,[1] that relator is not entitled to the relief asked for in this case, because respondent says that relator has never, by any Act, been granted a franchise to make and vend electricity for any purpose whatever, but that whatever rights, privileges and franchises it ever enjoyed were confined to making and vending gas, gas-lights, gas-fixtures and any substance or material used as a substitute therefor, and that electricity whether used for lighting or power purposes is not a substance or material, and hence relator has not any right to make or vend the same anywhere.

[1] Id., p. 27.

It is further averred[1] —

That relator has heretofore placed its pipes and fixtures beneath the surface of the street on the east side of Broadway from Mound street to Olive street, and at divers and sundry other places beneath the surface of the streets of the city of St. Louis, for the purpose of transmitting and vending and supplying gas to consumers in the city of St. Louis; that in order to convey electricity it is necessary to carry the same by means of wires strung on poles above the surface of the streets or by means of wires strung in non-conductive tubes or conduits beneath the surface of the streets, and that relator has never acquired from the State of Missouri or the city of St. Louis, any right to place such wires above or beneath the streets of said city; that it is provided by Sec. 2721 of Art. 5, of Chap. 42, Rev. Stats. 1889, that no company shall place its wires and other fixtures under ground in any city unless it shall first obtain consent from said city, through the municipal authorities thereof; and that it is provided by Art. 2, Chap. 15, Rev. Ordinance of the city of St. Louis, 1887, as the same has been amended by Ord. No. 16,894, that no wires, tubes or cables conveying electricity for the production of light, heat or power, shall hereafter be placed along or across any of the streets, alleys or public places in the city of St. Louis, by any person, corporation or association not having, previous to the passage of this ordinance, accepted and complied with ordinance No. 12,723, now amended, or shall be duly authorized by the municipal assembly, and then only upon condition that such person, corporation or association so authorized by ordinance, before placing its wires, tubes and cables under ground shall file in the office of the Board of Public Improvements an application therefor, stating in detail the streets, alleys or public places which said wires, tubes or cables are to occupy, and the manner in which said wires, tubes or cables are to be secured or supported and insolated, together with a plat showing the route of such wires, tubes and cables, and that thereupon if the same is approved, the Board of Public Improvements shall grant a permit there-

[1] Id., p. 27.

for, subject to such restrictions, regulations and qualifications as may be prescribed by said board, and all such work shall be done under the supervision of and to the satisfaction of the supervisor of city lighting; and that whenever an alley is available for placing such wires, tubes or cables, the same shall be placed in or under alleys and not along or under streets; that relator has never accepted the provisions of said article and chapter, nor of said ordinance No. 16,894, nor has it ever been authorized by the Municipal Assembly of St. Louis to place its wires, tubes and cables under the streets or alleys of St. Louis.

That said ordinance provisions are valid under Paragraph 2, Section 26, Article III of the charter of St. Louis, which gives said city the power to regulate the use of all streets, avenues, alleys, &c., in said city; and are legal enactments notwithstanding any rights which relator now has or may heretofore have had by virtue of any Act of the General Assembly of Missouri:

That relator has never made application to the Board of Public Improvements for a permit to place its wires, tubes and cables underground in said city, nor has complied in any manner with any of the ordinance provisions aforesaid, and that respondent has not the power to grant any such permit as is asked for by relator:

Further[1] that on March 2, 1857, and likewise on March 26, 1868, lighting by electricity was wholly unknown to art, and that the General Assembly of Missouri did not and did not intend to confer upon relator, by either of said Acts, the right to make or vend electricity for lighting purposes.

Demurrer to, and motion to strike out, parts of return.

Said demurrer, and motion to strike out, are set out in the record,[2] also the opinion of the court overruling the

[1] Id., p. 28.

[2] Id., pp. 29, 32.

same,[1] which action of the court is assigned for error; [2] but are omitted here, all questions of law arising thereon being again presented by relator's reply to said return [3] and the demurrer of said respondents thereto,[4] sustained by the court upon the same grounds stated in said opinion, which ruling is also assigned for error.[5]

Reply to Respondent's return.

To said return, relator filed its plea or reply, both as to law and fact, in substance averring as follows:—

That said Act of March 26, 1868, is not unconstitutional or void, nor in conflict with any provision contained in Article VIII of the Constitution of Missouri, 1865; but is a valid amendment of said Act of March 2, 1857.

That by Section 8 of said Act of March 2, 1857, said relator and said Act incorporating it were exempted from the operation of Sections 6, 7, 13, 14, 15, 18 and 20 of Article 1 of the Act entitled "An Act concerning corporations," approved November 23, 1855.

Sections 6 and 7, respectively, of said last mentioned Act are as follows:—

"Sec. 6. If any corporation hereafter created by the legislature shall not organize and commence the transaction of its business within one year from the date of its incorporation, its corporate powers shall cease.

"Sec. 7. The charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension and repeal in the discretion of the legislature."

That being so exempted from the operation of Section 6 of said Act of November 23, 1855, relator was not required

[1] Id., p. 37.
[2] Id., p. 3.
[3] Id., p. 46.
[4] Id., p. 58.
[5] Id., p. 3.

to organize nor to commence business within one year from the date of its incorporation, nor was any time prescribed in its charter, to wit, said Act of March 2, 1857, or said amendatory Act of March 26, 1868, for such organization or commencement of business:

And being also exempted from the operation of said Section 7 of said Act of November 23, 1855, relator's charter became and was a contract between the State of Missouri and said corporation, which was not nor is subject to alteration, suspension or repeal by said State of Missouri or by any legislative Act or provision of the constitution thereof subsequently adopted, except with the consent of said corporation: and in virtue of the provisions contained in said charter, especially in Sections 1 and 4 of said Act of March 2, 1857, the corporators and stockholders of relator had the right under said charter to organize said corporation and to commence the transaction of its business at any time after said Act of March 2, 1857, took effect, without reference to the provisions of said Act of November 23, 1855, and without reference to any Act of the General Assembly or any provision of the constitution of said State which might thereafter be enacted or adopted: and further,

That by an Act of the General Assembly of Missouri approved February 4, 1837, incorporating the St. Louis Gas Light Company, amended by an Act approved February 11, 1839, said Gas Light Company had the exclusive right of vending gas lights in the City of St. Louis and its suburbs for twenty-five years from January 1, 1840, and, in the event that the City of St. Louis did not purchase its property, until January 1, 1890; that on March 2, 1857, and until the year 1873, said charter of the St. Louis Gas Light Company was in full force, relator being thereby precluded from selling gas and gas light in said city without the consent of said St. Louis Gas Light Company,

which was not obtained until 1873, and therefore relator did not begin to manufacture and sell gas until the year 1873:

Wherefore, the several averments in said return in respect of the time when relator organized as a corporation, and when it commenced the transaction of business, constitute no defense to this proceeding.

Relator denies that it did not organize as a corporation within one year from the time when said Act of March 2, 1857, took effect: averring, on the contrary, that during the year 1857, the corporators therein named, all being present, met in the city of St. Louis, accepted said charter, opened books for subscriptions to the capital stock of said company, the entire amount whereof was then and there subscribed, and said company was thereupon organized by electing five directors and a president and secretary of said corporation; and further avers that said corporation commenced business long before the year 1873:

Further avers that said Act of March 26, 1868, is not void nor in conflict with any provision in Article IV, Section 25, of the Constitution of Missouri of 1865, nor is an Act reviving or re-enacting said Act of March 2, 1857; nor does said Act of March 26, 1868, revive or re-enact or purport to revive or re-enact said Act of March 2, 1857, by mere reference to the title thereof; nor does it amend or purport to amend said Act of March 2, 1857, by providing that designated words thereof shall be struck out, or that designated words thereof shall be struck out and others inserted in lieu thereof: wherefore relator says that the several averments in said return setting forth the grounds upon which as alleged said Act of March 26, 1868, violates Section 25 of Article IV of the Constitution of Missouri, 1865, and is therefore null and void, are immaterial and constitute no defense to this proceeding; and further

Denies that by the terms of section 9 of said Act of

March 2, 1857, relator's charter expired, as alleged, on March 2, 1887; avers that though said Laclede Gas Light Company, relator, was duly organized as a corporation in the year 1857, the city of St. Louis did not at the expiration of twenty years from the time of the organization of said company, nor at any time, purchase or offer to purchase the property and effects of said company or any part thereof:

Avers that even if it were true, as averred in said return, that electricity is not a substance or material, which relator denies, said averment is immaterial, and constitutes no defense to this proceeding; and further,—

That the object for which relator was incorporated, as set forth in said Act of March 2, 1857, and referred to in said Act of March 26, 1868, amendatory thereof, was to carry on the business of lighting the city of St. Louis, as well the public streets and alleys of said city as the private and public buildings thereof; that by said charter was granted to relator the right and privilege of lighting the said city and of making and vending gas, gas-lights, gas-fixtures, and any substance or material that might at the date of said charter, to-wit, on March 2, 1857, or at any time thereafter, be used as a substitute therefor, and to that end relator was expressly empowered to establish and lay down in any part of the corporate limits of said city as then or thereafter established all pipes, fixtures or other thing properly required to do the same, the same to be done with as much dispatch and as little inconvenience to the public as possible.

That for the purpose of lighting a city, or to illuminate any space therein, whether a public street or alley, or a building or any portion thereof, it is necessary to produce artificial light in the space to be illuminated; that artificial light is produced by making incandescent, that is to say, by bringing to a condition of white heat, in which it gives out light, any substance or material capable of being so used: that in order to light said city as aforesaid, relator was expressly authorized by its charter to make and vend

not only illuminating gas, but any substance or material which might then or thereafter be used as a substitute therefor, and to that end to establish and lay down at any point within the corporate limits of said city all pipes, fixtures or other thing properly required to do the same: that illuminating gas is a highly inflammable compound of carbon and hydrogen, chemically combined in certain fixed proportions: that in order to use said gas for illuminating purposes, it must be set on fire, which decomposes said gas, setting free the carbon therein, in the form of fine particles, and rendering said carbon particles incandescent, which produces what is called gas light.

That light may also be produced from carbon, by means of electricity, to wit, by using carbon, not compounded with any other element, in the form of rods or filaments, which may be and are brought to a condition of incandescence by transmitting into or through said carbon rods or filaments what is called electricity, by means of apparatus suitable therefor; the result being that the carbon thus rendered incandescent gives out what is called electric light, which has greater illuminating power than gas light and is commonly used as a substitute therefor, as well for the illumination of public streets and places as of public and private buildings in many cities throughout the United States.

That the right and privilege of lighting the city of St. Louis as aforesaid granted by its charter to relator, includes the production of light in the manner last above described, to wit, by making carbon or any other suitable substance incandescent by means of electricity, equally with the right or privilege of making and using carbon in its compound form of illuminating gas, and by making it incandescent in the manner above stated, to wit, by the application of heat: carbon being in either case the substance or material which is made incandescent, thereby producing light, though when illuminating gas is used, the carbon is in a compound form, the particles thereof being set free and made incandescent by heat as above stated, producing what is called gas light, while in the production of electric light pure carbon is used as a substitute for gas, and is made incandescent by the application of electricity.

It is true, as in said return alleged, that relator, therein exercising its corporate franchise of lighting the city of St. Louis, and of vending gas and gas light, has heretofore established, placed and laid down certain pipes and fixtures beneath the surface of the street on the east side of Broadway from Mound Street to Olive Street, and at divers and sundry other places beneath the surface of the streets of said city of St. Louis, for supplying gas to its consumers; and by means thereof relator has during more than ten years last past carried on, and still carries on, its business as a lighting company, of all which said city and the municipal authorities thereof had notice and have at all times acquiesced therein.

It is also true that in order to produce or furnish light by means of electricity, it is necessary to use wires for conducting the same, and to support said wires either on poles above the surface of the streets, as relator is now doing under a contract with said city of St. Louis, or in tubes or conduits beneath said surface. Relator states that its purpose in making the excavation on Broadway, mentioned in said petition, was to construct and place underground a conduit for wires, such conduit and wires being properly required for the production of electric light as a substitute for gas light: that the conduit and wires intended by relator to be so laid down are of the most approved description, such as are used for like purposes in other cities, said conduits occupying when completed a space not exceeding thirty inches in width under the surface of the street, with provision for access thereto at suitable intervals through manholes properly covered and protected, less than forty inches in width at the surface of the street: the said conduits and manholes when completed and in use, offering no obstruction whatever to the use of the streets for travel and traffic, and the danger to life and property which attends the use of overhead electric wires, such as relator is now using under contract with said city of St. Louis for the purpose of lighting public streets and alleys therein, being entirely avoided by placing said wires in said conduits.

Denies that relator never acquired from the State of

Missouri any right to place such wires above or beneath the streets of said city:

Denies that it is provided by Section 2721, Article V, Chapter 42, Revised Statutes of Missouri, 1889, that no company shall place its wires or other fixtures underground in any city unless it shall first obtain the consent of said city through the municipal authorities thereof:

Avers that if the provisions of said Section 2721 purported to apply to relator, they would be invalid, as impairing the obligation of the contract contained in relator's charter; but that said Article V of Chapter 42 is part of the general corporation law of Missouri, and said Section 2721 in terms applies exclusively to corporations organized thereunder for the purpose of constructing or maintaining telephone or telegraph lines:

Admits that by Article II, Chapter XV, Revised Ordinance of the City of St. Louis, 1887, amended by Ordinance No. 16,894, the municipal authorities of said city undertook to prescribe conditions for placing wires, tubes and cables conveying electricity along the streets and alleys of said city, but avers that the provisions of said ordinance are not fully set forth in respondent's return:

That said ordinances in said return mentioned were reenacted by Article II, Chapter XV of the Revised Ordinance of said City of St. Louis, 1892, to-wit, Ordinance No. 17,188, approved April 7, 1893, being Sections 603 to 614, both inclusive, of said Revised Ordinance, 1892; which sections, since April 17, 1893, were and are the only existing ordinances of said city prescribing any such conditions, and are the ordinances referred to in said return, and are in the words and figures following:

Article II. *Of electric wires, tubes and cables.*

Sec. 603. *Conditions as to placing wires, etc.* — That no wires, tubes or cables conveying electricity for the production of light, heat or power shall hereafter be placed along or across any of the streets, alleys or

public places in the city of St. Louis, by any person, corporation or association not having previous to the passage of this ordinance, accepted and complied with ordinance number twelve thousand seven hundred twenty-three, now amended, or shall be duly authorized by the municipal assembly, and then only as hereinafter provided. (Revised Ordinance 1887. Sec. 581. Amended.)

Sec. 604. *Wires to be placed as prescribed by board.* — All such wires, tubes or cables, along or across any of the streets, alleys or public places of the city of St. Louis shall be placed at such distances above or below the surface of the ground, and secured in such manner as shall be prescribed by the board of public improvements. (Revised Ordinance 1887. Sec. 582.)

Sec. 605. *Application and plat to be filed.* — That any person or persons, corporation or association, duly authorized by ordinance to do business in the city of St. Louis and desiring to place along or across any of the streets, alleys or public places of the city of St. Louis, such wires, tubes or cables, shall file in the office of the board of public improvements an application therefor, stating in detail the streets, alleys or public places which said wires, tubes or cables are to occupy, and the manner in which said wires, tubes or cables are to be secured or supported and insulated, together with a plat showing the route of such wires, tubes or cables. (Revised Ordinance 1887. Sec. 583.)

Sec. 606. *Permit may be granted.*— The board of public improvements is hereby authorized, upon the filing of the application and plat required by the preceding section, to grant a permit for such occupancy of the streets, alleys and public places herein named, with such restrictions, regulations and qualifications as may be prescribed by said board and under the supervision and to the satisfaction of the supervisor of city lighting. (Revised Ordinance 1887 Sec. 584, Amended.)

Sec. 607. *Wires, etc., may be placed on telegraph poles, etc., when.* * * *

Sec. 608. *Poles to be placed in alleys, when.* * * *

Sec. 609. *Dimensions, construction and location of poles.* * * *

Sec. 610. *Streets and alleys to be replaced.* * * *

Sec. 611. *Alterations in location of poles, etc., may be ordered.* * * *

Sec. 612. *Privileges conferred, on what conditions.*—No person or persons, corporation or association, shall be entitled to any of the privileges conferred by this article, except upon the following conditions: That said person or persons, corporation or association, before availing himself or itself of any of the rights or privileges granted by this article, shall file with the city register his or its acceptance of all the terms of this article, and agree therein that he or it will file with the comptroller of the city, on the first days of January and July of each year, a statement of his or its gross receipts from his or its business arising from supplying electricity for light or power for the six months next preceding such statement, which shall be sworn to by such person or persons, or the president or secretary of such corporation or association; and further agree that he or it will, at the time of filing such statement with the comptroller, pay into the city treasurer two and one-half per cent on the amount of such gross receipts up to the year eighteen hundred ninety, and five per cent on the amount of gross receipts thereafter. And said person or persons, or corporation or association, shall at the time of filing said acceptance, also file with the city register his or its penal bond in the sum of twenty thousand dollars with two or more good and sufficient securities, to be approved by the mayor and council, conditioned that he or it will comply with all the conditions of this article, or any ordinance which may be hereafter passed, regulating the placing of wires, tubes or cables in the streets and alleys for the purposes named therein; that he or it will comply with

all the regulations made by the board of public improvements having reference to the subject embraced in this article or any ordinance herein named; that he or it will make the statements and payments required by the provisions of this section, and will save the city of St. Louis harmless and indemnified from all loss, cost or damage by reason of the exercise of any of the privileges granted by this article or any ordinance which may be hereafter passed relating to the subject-matter of this article. (Revised Ordinance 1887. Sec. 590.)

Sec. 613. *Penalty.* — Any person or persons, corporation or association which, or any president, manager, superintendent or officer in charge of any corporation or association who shall violate or fail to comply with any of the provisions of this article, shall be deemed guilty of a misdemeanor, and upon conviction thereof, be fined not less than fifty dollars, nor more than five hundred dollars. (Revised Ordinance 1887. Sec. 591.)

Sec. 614. *Reservation of rights.* — The city reserves the right to alter, amend or repeal this article at any time. (Revised Ordinance. Sec. 592.)

Admits that relator did not previous to the passage of said Ordinance No. 16,894, accept the provisions of said Article II, Chapter 15, Revised Ordinance, 1887, and that it has never accepted the provisions of said Ordinance No. 16,894, and that it, said relator, has not been authorized by ordinance of the Municipal Assembly of the city of St. Louis to place its wires, tubes or cables under the streets or alleys of said city.

Denies that said ordinances are valid, so far as relator's charter rights are concerned, or that said city had power to adopt or enforce the same, either under paragraph 2 of Section 26 of Article III of the charter of said city, as by respondent alleged, or under any other provision of said charter: and avers,

That by reason of the exemptions contained in Section 8 of said Act of March 2, 1857, relator's charter, as granted and as amended by said Act of March 26, 1868, was and is a contract by the State of Missouri with relator, not subject to alteration, suspension or repeal by the State of Missouri, or by any municipality thereof; that the enforcement against relator of said ordinances would deny to relator its corporate rights and franchises aforesaid and would impair the obligation of said contract of said State

contained in relator's charter as amended, in contravention of Section 15 of Article II of the Constitution of Missouri, 1875, and also of Section 10 of Article I of the Constitution of the United States, each of which constitutional provisions is relied on by relator for the protection of its corporate rights and franchises in this behalf.

That the only condition annexed by relator's charter to the exercise of its right "to establish and lay down in said city all pipes, fixtures or other thing properly required" to carry on relator's said lighting business, is that the same shall be done "with as much dispatch and as little inconvenience to the public as possible."

That in preparing to lay its wires underground, as stated in its petition, and in applying to said Street Commissioner for a permit to make the necessary excavation, relator fulfilled every condition to which it is lawfully subject in that behalf: and that respondent did not refuse such permit to relator on the alleged ground, nor in fact for the reason, that by laying its wires under ground in the manner by it proposed, relator would cause any inconvenience to the public, but expressly and unconditionally refused to permit relator to make any excavation in any street of said city:

That as against this relator, said ordinances above mentioned are not valid enactments, nor constitute any defense to this proceeding,

Because, as relator avers, said provisions are not, so far as relator's rights are concerned, lawful or reasonable regulations of the use of the streets of said city, but were intended to and do prohibit relator from exercising its said charter rights and powers except upon compliance by relator with conditions which the city of St. Louis has not, nor has the Municipal Assembly thereof any lawful right or power to impose on relator in that behalf, including as one of said conditions that relator shall first be duly author-

ized thereto by the Municipal Assembly, thereby impairing the obligation of the contract contained in relator's charter as amended:

Because the enforcement against relator by said city or any officer thereof of the conditions prescribed by said ordinances would not be a lawful or reasonable exercise of the power of said city under its charter to regulate the use of its streets or of the police power of said city, but is an attempt by said city under color of its charter powers to compel relator to enter into the obligations and to pay to said city from time to time the tax of five per cent. upon the gross annual receipts from relator's business prescribed by Section 612, Article II, Chapter 15, of the Revised Ordinance, 1892, above mentioned: forasmuch as it is provided by said Section 612, that no person or persons, corporation or association shall be entitled to any of the privileges conferred by said Article II, Chapter 15, except upon fulfilling the several conditions in said Section 612 prescribed as hereinbefore set forth:

Because among the conditions prescribed by said Section 612, relator would be compelled before availing itself of any of the rights or privileges mentioned in said Article II, Chapter 15, Revised Ordinance, 1892, to file with the City Register its penal bond in the sum of twenty thousand dollars, conditioned that relator will comply with all the conditions of said Article II or with any ordinance which might thereafter be passed, and will comply with all regulations which may be made by the Board of Public Improvements having reference to the subject-matter embraced in said Article II or any ordinance therein named; all which requirements and conditions are a denial of relator's rights under its charter and impair the obligation of the contract contained therein as aforesaid:

Because said Article II, Chapter 15, Revised Ordinance, 1892, purports to authorize the Board of Public Improvements of said city, in granting a permit for the use or occupation of the streets, alleys and public places of said city for the purposes therein mentioned, to prescribe such restrictions, regulations and qualifications as said Board may think fit in respect of the use of said streets, alleys and public places, and requires every person or corpora-

tion obtaining such permit, as a condition of availing itself of the privileges mentioned in said Article II, to agree to comply with all such regulations made by said Board; whereas the power to regulate the use of the streets of said city granted by clause 2, section 26 of Article III of its charter, is granted only to the mayor and Municipal Assembly of said city, to be exercised by ordinance not inconsistent with the constitution or any law of this State, or with said charter, and does not authorize the said Mayor and Municipal Assembly or either of them, by ordinance or otherwise, to delegate to the Board of Public Improvements of said city the power to make regulations for the use of said streets; wherefore relator says that said requirements and said condition are unlawful and void.

And relator says that the several conditions and requirements prescribed in said Article II, Chapter 15, Revised Ordinance, 1892, are not independent of each other, but are so framed as to subject relator, its officers and agents, to the penalties prescribed in section 613 of Revised Ordinance, 1892, unless before placing along, across or under any street of the city of St. Louis any wires such as hereinbefore mentioned, it, said relator, shall not only have obtained authority so to do from the Municipal Assembly of the city of St. Louis, but shall also have filed in the office of the Board of Public Improvements of said city an application therefor such as prescribed in section 605 Revised Ordinance, 1892, and shall have obtained a permit therefor from said Board, under such restrictions, regulations and qualifications as said Board may prescribe, and shall also have filed with the City Register its acceptance of all the terms of said Article II, Chapter 15, and shall therein agree as required by Section 612 Revised Ordinance, 1892, to file with the Comptroller of said city sworn semi-annual statements of its gross receipts from its business and to pay to the City Treasurer a tax of five per cent. upon the amount of such gross receipts, and shall also have filed with the City Register its bond in the sum of twenty thousand dollars, conditioned as prescribed in said Section 612, Revised Ordinance, 1892: all which requirements and conditions are a denial of relator's rights under its charter

and impair the obligation of the contract contained therein as aforesaid.

Wherefore relator says that it was not under any legal obligation to apply to the Municipal Assembly of said city for authority, nor to the Board of Public Improvements of said city for a permit, to place its wires underground in any street thereof, and that it was the duty of respondent, as Street Commissioner of St. Louis, under the provisions of Section 568, Article II, Chapter 15 of the Revised Ordinance 1887, of said City of St. Louis, to issue to relator a permit for an excavation such as applied for by relator.

Relator denies that either on the 26th of March, 1868, or on the 2nd of March, 1857, lighting by electricity was wholly unknown to art. On the contrary, relator avers that long before either of said dates electricity had been used for illuminating purposes, and apparatus had been devised and publicly exhibited to great numbers of persons by means of which solid bodies were made incandescent by electric currents so as to produce light which could be and was used for purposes of illumination, substantially as hereinbefore set forth.

Respondent's demurrer to reply.

The demurrer of respondent Murphy to said reply,[1] adopted as its own by the City of St. Louis,[2] was on the following grounds:

Generally, because said reply does not state facts sufficient to constitute a defense to respondent's return.

Specially to that portion of said reply beginning with the words "that it, said relator, is advised," and ending with "or any part thereof,"

1. Because said matters are mere conclusions of law.

[1] Id., p. 58. [2] Id., pp. 60–1.

2. Because said matters do not show any right or power in relator to have or ask the rights prayed for in this proceeding.

3. Because said matters show on their face that relator's charter had expired prior to the institution of this proceeding, and therefore relator has no standing in court and no right to engage in business at all.

Specially to that part of relator's reply beginning with the words "Relator is advised and avers that even if the averment in respondent's return," and ending with "entirely avoided by placing said wires in said conduits,"

1. Because it appears therefrom that relator has no power to manufacture or vend electricity.

2. Because it appears therefrom that electricity may be used for producing light and may be used in place of or as a substitute for gas light, but it further appears that relator never had any power to manufacture or use the same.

3. Because it appears affirmatively from said reply that electricity is not a substance or material, and relator has no right to manufacture and vend the same.

Specially, to that portion of said reply beginning with the words "relator admits that by Art. 2, Chap. 15, Rev. Ord. of the City of St. Louis, 1887," and ending with "as applied for by relator"—

1. Because it affirmatively appears from such allegations of relator's reply that relator is subject to the police regulations contained in said ordinance provisions:

2. Because said ordinance provisions do not in any manner impair the obligation of any contract relator may have or at any time may have had, but they are valid regulations in any event.

Specially, to that part of relator's reply beginning with "relator denies that either on the 26th of March, 1868," and ending with "substantially as hereinbefore set forth"—

1. Because relator never having had the right to manufacture or vend electricity, it is not material to it or to this controversy whether or not electricity was known to art on the 2nd of March, 1857, or on the 26th of March, 1868.

2. Because the Act of 1868 did not confer any more power on relator in respect to lighting by electricity than was conferred by the Act of 1857, and relator is not entitled to the benefit of anything which became known to art in this respect between March 2, 1857, and March 26, 1868.

Said demurrer was filed by respondent Murphy on June 29, 1895.[1] On July 1, 1895, the city of St. Louis by consent and leave, entered its appearance and adopted said demurrer as its own: and on July 2, 1895, without further argument, it was by the Court ordered and adjudged[2] —

"That the demurrer of respondents Murphy and the city of St. Louis to the reply of relator be sustained for the reasons given in the opinion heretofore rendered in this cause, to which reference is hereby made as part of this judgment."

Opinion of the Court.

Omitting the abstract of relator's petition therein contained, said opinion was as follows:[3]

* * * * * * * * * * *

Respondent made return to said writ, and by affirmative averments put in issue the rights claimed by relator, and set up the provisions of certain city ordinances regulating the use of electric wires on the streets of the city, and averred a non-compliance with the requirements of such ordinances. By demurrer to parts of the return and motion to strike out other parts the following issues of law were fairly framed:

First. Is the act of March 26, 1868, unconstitutional as

[1] Id., p. 58. [2] Id., p. 61. [3] Id. p. 40.

being in conflict with section 2, article 8, of the Constitution of Missouri of 1865?

Second. Is said act void as being in conflict with section 25, article 4, of said Constitution?

Third. Did the charter of relator expire by limitation at the end of thirty years from the date of the act of March 2nd, 1857?

Fourth. Do the powers granted relator include the right to manufacture, sell or distribute electricity for lighting purposes?

Fifth. Has relator the right, under its charter, to place its wires underground without the assent of the municipal authorities and without compliance with the requirements of the valid ordinances of the city?

I. The object to be accomplished by the writ is to require Murphy as Street Commissioner of the city of St. Louis, to issue to relator a permit to make such excavations on one of the public streets of the city as may be necessary for the purpose of laying its electric wires underground. The constitutionality of the acts under which relator claims corporate existence is put in issue by the answer of respondent and demurrer thereto. Respondent also charges that, though the acts of incorporation were valid, in the first instance, the life of the corporation itself has expired by limitation of its existence, as fixed by the charter and general laws of the State.

The city is not made a party to this proceeding, and we do not deem it necessary in this case to pass upon any questions that do not directly concern the duties of the Street Commissioner. We will not therefore consider, or express an opinion upon, any question involving the right of relator to exercise the rights, or enjoy the franchises which appear to have been granted under the Acts of the General Assembly mentioned in the statement.

For the purpose of discussing the other questions involved we will then assume, without deciding, or intimating an opinion, that relator is an existing corporation, possessing all the powers, rights and privileges its charter purports to confer upon it.

It is insisted by relator that, under its charter, it acquired from the State a vested right to the use of the streets of

the city of St. Louis, under which to lay its pipes for the transmission of gas, or any other "substance or material" that might thereafter be adopted for illuminating purposes, and that such right was beyond the control of the municipal authority; that electricity is a substance and material within the meaning of the charter, and therefore it has a vested right to lay its wires beneath the surface of the streets for the purpose of conducting electricity through the city for illuminating purposes, and that this right can not be interfered with unreasonably by the city.

With the views we take of this question we do not think it necessary to inquire whether the right to use electricity for making light was included under the terms "substance or material" as used in the charter. It appears that relator has, for a number of years, under contracts with the city, been lighting its streets by electricity, conducted by wires strung above the surface of the streets, and other questions besides the abstract right to do so would be involved in such inquiry. We will therefore confine our inquiry to the question whether relator has a vested right to place its electric wires under the surface of the streets without the assent of the municipal authorities thereof, and without compliance with valid ordinances of the city.

Generally speaking, it is true, the legislature has supreme control of the streets of cities. It is also true that it may, and generally does, delegate to municipal corporations such measure thereof as it deems best. The control thus delegated may be exercised by the municipal authorities.

Subsequent to the act of 1868, under authority of the Constitution of 1875, the city of St. Louis adopted a charter whereby the State delegated to it the power to regulate the use of its streets, and the power to pass all ordinances, not inconsistent with the provisions of the charter or the laws of the State, as may be expedient in maintaining the peace, good government, health, and welfare of the city, its trade, commerce and manufactures.

In pursuance of these powers the city enacted certain ordinances regulating and restricting the use of electric wires in the city and requiring the assent of the Board of Public Improvements in respect to the manner in which electric wires, tubes and cables should be secured or sup-

ported and insulated. It is charged in the return, and admitted by the demurrer, that relator had never complied with the requirement of this ordinance. Relator insists that the provisions of the ordinance can not apply to rights secured to it by the State long prior to the date of the charter.

It is the well-settled present policy of the law of this State to delegate to municipal corporations not only general police powers, but the control of their streets in respect to the use thereof for public purposes other than that of ordinary travel by pedestrians and private vehicles. Thus the Constitution prohibits the Legislature from granting the right to construct and operate street railways within any town or village without first acquiring the consent of the local authorities having control of the streets (Sec. 20, Art. 12, Const. of Mo.).

Again the statute requires telegraph and telephone companies to obtain the consent of the city, through its municipal authorities, before they can exercise the right to lay their wires, and other fixtures, underground in any of its streets (R. S. 1889, sec. 2721).

Electric wires, when charged, are recognized as being dangerous to life and property, and their use is therefore subject to police regulations (W. U. Telegraph Co. *v.* Philadelphia, 21 Am. and Eng. Corp. Cas. 40 and note; Dill. Munic. Corp., sec. 698).

The State can not limit its exercise of the police power by contract or in any other way. It was said by Chief Justice Waite: "All agree that the legislature cannot bargain away the police power of the State. Irrevocable grants of property and franchises may be made if they do not impair the supreme authority to make laws for the right government of the State; but no legislature can curtail the power of its successors to make such laws as they may deem proper in matters of police. Stone *v.* Mississippi, 101 U. S., 817; see Boyd *v.* Alabama, 94 U. S., 645; Metropolitan Bd. *v.* Barrie, 34 N. Y., 657; Railroad *v.* Mayor of Balt., 77 Md., 381."

Dillon says: "The citizen owns his property absolutely, it is true; it cannot be taken from him for any private use whatever, without his consent, nor can it be taken for any

public use, without compensation; still he owns it subject to this restriction, namely, that it must be so used as not to unreasonably injure others, and that the sovereign authority may, by police regulations, so direct the use of it that it shall not prove pernicious to his neighbors, or the citizens generally. Dill., Munic. Corp.

The grant by the State to relator, though construed to include the right to use electricity for illuminating purposes, in respect to such right was taken subject to reasonable regulations as to its use, and the power to regulate has been delegated to the city of St. Louis.

Under its general police power the city has the right to require compliance with reasonable regulations as a condition to using its streets by electric wires.

II. But this is not the only reason why the city should not, under its special power to regulate the use of its streets, and under its general police power, have the right to supervise and regulate the manner in which electric wires of relator and all others should be placed and used in the public streets.

The art of producing light by electricity was wholly unknown to science at the time the franchise was granted to relator. The Legislature, having no knowledge of the use that would be made of streets in applying new discoveries in producing light, could not have intended to grant rights and powers inconsistent with their ordinary use. It would be most unwarrantable to imply, not only that relator had the right under the general words used in the act of incorporation to use electricity for lighting purposes, but that it also had the right to adopt its own methods for exercising that power, regardless of the paramount rights of the public to the use of the streets.

The powers delegated to the city to regulate the use of its streets existed before the art of lighting by electricity was known, or at least before relator adopted it, and the art should be exercised, if at all, under the powers thus in force when it was brought into use.

The following declaration of law was quoted approvingly in Carroll *v.* Campbell (108 Mo., 559): "It is a well-settled rule of construction of grants by the Legislature to corporations, whether public or private, that only such

powers and rights can be exercised under them as are clearly comprehended within the words of the act or derived therefrom by necessary implication, regard being had to the object of the grant. Any ambiguity or doubt arising out of the terms used by the Legislature must be resolved in favor of the public." Fanning *v.* Gregoire, 16 How., 534.

There seems to me much stronger reason for applying this rule to the manner in which a right conferred shall be exercised when more than one method is open, and when the rights and safety of the public are more or less affected by either. In such case, where the public streets of a city, which are under municipal control, are to be used, it seems too plain for argument that the city should have the right to direct the manner in which the use should be exercised.

Again, it is a matter of common knowledge that electricity is used for the purposes of transmitting sound by telephone, for transmitting messages by telegraph, for generating light, and for producing power. These uses are regarded as public, and have become necessary to the business and convenience of the country, and particularly that transacted in large cities. Overhead electric wires in some streets are numerous. These contribute very materially to the public convenience and private business, but when not properly supervised and regulated endanger the lives and property of the public. If used, as they generally are, in the public streets, public safety requires that they should be under police regulation and municipal control.

It is a matter also of public notoriety that the question is now being considered whether it would not be necessary, in the interest of public safety, as well as convenience, that these wires should be placed under ground, so as thereby to leave the streets safe and unobstructed.

As a police regulation, we have no doubt the municipal authorities would have a right to require this to be done, in case no vested rights were infringed. Many corporations and companies doubtless now use electric wires for the various purposes above mentioned. It cannot be said, not having the various charters before us, that one of these

possesses rights superior to those of any others. To accommodate them all, to prevent monopolies, and to regulate the use of the streets, it seems absolutely necessary that the municipal authorities should have the right to direct the manner in which wires shall be placed under ground. Without such regulations, relator, or any other corporation using electric wires, could place them under ground in such a manner as to practically exclude all others. Moreover, relator, as one of its important franchises, asserts the power to sell, lease or dispose of any portion of said rights, privileges and franchises to individuals, associations or corporations, intending or desiring to exercise the same within any portion of the limits named. Thus, under its charter allowing the rights herein claimed, it could practically control the use of the streets in respect to laying electric wires under ground, and exclude the city from one of the most important of its municipal powers. The Legislature could never have contemplated such a result.

By giving the city the right to regulate the laying of electric wires under ground, relator is deprived of no vested right. If its charter gives it the right to use electricity for lighting purposes it can do so, as we understand from the petition it has been doing, in the method now in use in said city. If the city should determine that public safety requires these wires to be placed under ground, and provides the manner in which it shall be done, and relator believes its rights are thereby infringed, it will then be time enough to complain.

As the case is now presented we must hold that the city, under its power to regulate the use of streets, and under its general police power, has the right to require a compliance with regulations which either wholly prohibit relator from laying its wires under the streets or which regulate the manner in which it may be done.

Respondent under his official duties as Street Commissioner, properly refused to grant the permit demanded unless relator first complied with the requirements of the valid ordinances then in force.

Peremptory writ denied. All the Judges concur.

Errors assigned.

The errors in respect of which this writ was sued out are assigned as follows[1] —:

That the Supreme Court of Missouri erred —

In overruling relator's demurrer to respondent's return; and in overruling relator's motion to strike out portions of said return:

In sustaining respondent's demurrer to relator's traverse and reply to respondent's return; and in entering final judgment for respondents on the pleadings in this cause, denying to relator the writ of mandamus prayed for.

In deciding that the ordinance of the city of St. Louis pleaded in part by respondents, but which is fully set out in relator's reply, is a valid ordinance and binding upon relator; and that said ordinance does not impair the obligation of a contract between relator and the State of Missouri, and does not impair the vested rights of relator under its charter and the franchises granted to it by the State of Missouri prior to the enactment of said city ordinance:

In deciding that said ordinance of the city of St. Louis was a lawful exercise of the police power, and binding as such on relator, and that relator was subject to all the provisions and requirements of said city ordinance in the conduct of its business, and was bound to accept the same with all its provisions and conform to all its requirements before using the streets of said city for laying its wires beneath the surface of the streets for the purpose of conducting electricity through the city of St. Louis for illuminating purposes:

In holding that the art of producing light by electricity was wholly unknown to science at the time its charter and franchise were granted to relator.

[1] Id., p. 3.

BRIEF FOR PLAINTIFF IN ERROR.

I.

The court below denied to relator the right claimed by it, of laying its wires under the streets, on the ground that relator had not complied with the conditions prescribed by Article II, Chapter XV of the Revised Ordinance, 1892, of the city of St. Louis;[1] overruling relator's contention that said ordinance was in conflict with and impaired the obligation of relator's charter.

The question whether, as against relator, said ordinance is valid, necessarily involves the further questions presented by respondent's contention as to the existence, the validity and the proper construction of relator's charter. This court has jurisdiction to determine all said questions in this cause.

Scott *v.* McNeal, 154 U. S. 34, 45;
Mobile & Ohio R. R. Co. *v.* Tennessee, 153 U. S. 486, 492–5;
Bryan *v.* Board of Education, 151 U. S. 639, 650;
Huntington *v.* Attrill, 146 U. S. 658, 684;
New Orleans Water Works Co. *v.* Louisiana Sugar Co., 126 U. S. 18, 38;
Louisville Gas Co. *v.* Citizens Gas Light Co., 115 U. S. 683.

[1] *Supra*, p. 35.

II.

The amendatory Act of March 26, 1868, is not void as contravening Section 2 of Article VIII of the Missouri Constitution of 1865; nor was said Act an act reviving or re-enacting the Act of March 2, 1857, as by respondents contended.

Mo. Const. 1865, VIII, 2: G. S. 1865, p. 39;
State *ex rel. v.* C. G. & R. R. 48 Mo. 471;
State *ex rel.* Maggard *v.* Pond, 93 Mo. 606, 618–19;
Lynch *v.* Murphy, 119 Mo. 163, 174;
Giozza *v.* Tiernan, 148 U. S. 661;
St. Jo, etc., R. R. Co. *v.* Shambaugh, 106 Mo. 557, 568;
1 Rev. Stat. Mo. 1855, p. 371 (General Corporation Law), Ch. 34, Art. I, Sec. 6.

III.

Said amendatory Act of March 26, 1868, is not void as in conflict with Section 25 of Article IV of the Missouri Constitution of 1865, as by respondents alleged.[1] Said act is not an act *reviving* or *re-enacting* the Act of March 2, 1857, but is and purports to be an act to *amend* said last mentioned act, which under the Constitution of 1865, was within the power of the legislature: nor does it purport to revive or re-enact any act by mere reference to the title thereof. Nor does said Act of March 26, 1868, amend or purport to amend said Act of March 2, 1857, "*by providing* that designated words shall be struck out, or that designated words shall be struck out, and others inserted in lieu thereof." Said Act sets forth the part of act amended in

[1] *Supra*, p. 12.

the manner required by said Section 25, ArticleIV, of the Missouri Constitution of 1865, and is in all respects valid and in force.

State *ex rel. v.* Cape Girardeau, &c., R. R. Co., 48 Mo. 468, 471, affirmed in
St. Jo &c. R. R. Co. *v.* Shambaugh, 106 Mo. 569.

See the following Missouri statutes, prior to 1865:

Act of March 14, 1859 (Acts of 1858–9, p. 438);
" " March 20, 1860 (Acts of 1859–60, called session, p. 5);
" " January 16, 1860 (Acts of 1859–60, p. 526);
" " February 15, 1864 (Acts of 1863–4, p. 28);
" " February 13, 1864 (Acts of 1863–4, p. 110);
" " February 5, 1864 (Acts of 1863–4, p. 279);
" " November 23, 1863 (Acts of 1863–4, p. 112);
Cooley Const. Lim. (5th ed.), p. 68 (*56–7);
Mayor of Booneville *v.* Trigg, 46 Mo. 288, 289;
State *ex rel. v.* Draper, 47 Mo. 29;
State *v.* Geiger, 65 Mo. 306, 312;
State *v.* Chambers, 70 Mo. 625, 628;
Morrison *v.* St Louis, I. M. & S. R'y Co., 96 Mo. 602, 606;
State *ex rel. v.* Miller, 100 Mo. 439, 446;
State *v.* Bennett, 102 Mo. 356, 362–4;
St. Jo, &c., R'y Co. *v.* Shambaugh, 106 Mo. 557, 565, 568;
People *v.* Mahaney, 13 Mich. 496–7.

IV.

Relator's charter did not expire on March 2, 1887. The amendatory Act of March 26, 1868,[1] granted to relator " to

[1] *Supra*, p. 7.

have, hold and enjoy *forever*, all the rights, privileges and franchises granted to it by" said Act of March 2, 1857, as enlarged by said amendatory Act; and in virtue thereof relator now holds its franchises.

But even if said Act of March 26, 1868, were void, as by respondents alleged, relator's charter, under the provisions of Section 6 of the Act of March 2, 1857, would have been extended for thirty years from March 2, 1887; since relator's reply avers,[1] and respondents' demurrer admits, that relator was duly organized as a corporation in 1857, within one year from the time said Act took effect, and that the City of St. Louis has at no time purchased or offered to purchase the property and effects of said corporation or any part thereof.

Act of March 2, 1857, Sections 6: 9.[2]
State ex rel. Walker (Attorney-General) *v.* Payne, 31 S. W. Rep. 799.
St. Louis *v.* St. Louis Gas Light Co., 70 Mo. 119-20.

V.

The validity of relator's charter, to wit, of said Act of March 2, 1857, as amended by said Act of March 26, 1868, has already been three times affirmed by the Supreme Court of Missouri. The latest of said decisions was in a proceeding by mandamus instituted in October, 1890, by the city of St. Louis, respondent here, in the name of the State, to compel relator to reduce the price of gas, in conformity with an ordinance of said city enacted in March, 1890. Relator's plea that its charter was an irrepealable contract by the State of Missouri, under which its right to fix the price of gas sold by it could not be impaired by

[1] *Supra*, pp. 17, 18.

[2] *Supra*, pp. 5-6.

either State or municipal legislation, was sustained on demurrer by said court and the writ denied. The validity and perpetual duration of relator's charter rights under said Act of March 2, 1857, as amended by said Act of March 26, 1868, are therefore *res judicatæ*.

St. Louis *v.* St. Louis Gas Light Co., 70 Mo. 69, 115, 119–20, 120–2;
St. Louis Gas Light Co. *v.* St. Louis, 86 Mo. 495, 499;
State *ex rel.* City of St. Louis *v.* Laclede Gas Light Co., 102 Mo. 472, 484–6;
Chouteau *v.* Gibson, 76 Mo. 47.

VI.

The grant by the State to relator includes the right to use electricity for illuminating purposes.

1. Said charter expressly grants to said corporation (1) the privilege and right of lighting the City of St. Louis, and (2) the privilege and right of making and vending gas, gaslights, gasfixtures and any substance or material that *may be now or hereafter* used as a substitute therefor, and (3) all other powers necessary to execute and carry out the privileges and powers hereby granted to said company. By such words relator was plainly empowered to adopt any means of producing artificial light which might at any subsequent time become available, whether known or used in 1857 or not.

Act of March 5, 1857, Sec. 5;
Green Bay, &c., R. R. Co., *v.* Union Steamboat Co., 107 U. S. 98, 100, affirmed in
Ft. Worth City Co. *v.* Smith Bridge Co., 151 U. S. 294, 301;

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Ft. Worth City Co. *v.* Smith Bridge Co., 151 U. S. 294, 301;

Callaway M. & M. Co. *v.* Clark, 32 Mo. 305, 308;
Henning *v.* U. S. Ins. Co., 47 Mo. 432;
Ohio Ins. Co. *v.* Merchants' Ins. Co., 11 Humph. 1;
1 Morawetz on Corporations, §§ 320–21;
2 Beach Priv. Corp., § 385;

2. Electricity is a substance, within the meaning of said charter, for years past commonly used as a substitute for gas, in producing electric light as a substitute for gas light. Of this, the Court will take judicial notice; also, that since 1889 the Missouri general corporation law expressly provides for the formation of corporations which "shall have full power to *manufacture* and *sell* and to furnish such *quantities of* gas, *electricity* or water as may be required in the city where located, for public or private buildings or for other purposes," and authorizes any city, town or village to contract with such corporations "for the lighting *by gas or electricity*, or supplying with water the streets," etc, therein.

Carbon is a material which, when made incandescent by electricity in the manner proposed by relator, is commonly used as a substitute for gas made incandescent by heat, for the production of light, within the meaning of said charter: and of this also the Court will take judicial notice. Respondents' demurrer admits that it is relator's purpose, and is practicable, to produce electric light, as a substitute for gas light, by using carbon as a substitute for gas in the manner averred in relator's reply:[1]

Brown *v.* Piper, 91 U. S. 37, followed in
State *v.* Hayes, 78 Mo. 318;
Wolfe *v.* Mo. Pacific R'y Co., 97 Mo. 481–2;
Udderzook *v.* Commonwealth, 76 Pa. St. 340;
Luke *v.* Calhoun County, 52 Ala. 119;

[1] *Supra*, pp. 18–20.

1 Rev. Stat. Mo. 1889, Chap. 42 (General Corporation Law), Art. 8, Secs. 2793–4.
People *ex rel. v.* Wemple, 129 N. Y. 543;
S. C. 38 Am. & E. Corp. Cas., 657;
Commonwealth *v.* N. El. Light & P. Co., 145 Pa. St. 105;
S. C. 38 Am. & E. Corp. Cas., 651.

3. Under such a grant, it is immaterial whether the art of producing light by electricity was known at the date of relator's charter. But relator's reply avers, and respondents' demurrer admits, that it was known at that date, and of this also the Court will take judicial notice.

"The Electric Light, its history," &c., (Alglave and Boulard, Sloane's transl., Appletons, 1884), pp. 21–24;

VII.

The validity of the act of March 2, 1857, incorporating relator, is not questioned. For the purposes of this case, the court below conceded the validity of the amendatory Act of March 26, 1868, and assumed "that relator is an existing corporation, possessing all the rights, powers and privileges its charter purports to confer upon it:" also, that said charter powers included the right to use electricity for making light.[1]

Said charter contains an express and irrepealable grant to relator of the privilege and right of lighting the City of St. Louis, and of making and vending gas, gaslights, gas fixtures and any substance or material that may be now or hereafter used as a substitute therefor; and the further

[1] *Supra*, p. 30–1.

right, "*to that end*, to establish and lay down within the corporate limits of said city, as the same are now or may hereafter be established, all pipes, fixtures or other thing properly required in order to do the same, the same to be done with as much dispatch and as little inconvenience to the public as possible:" no other condition being prescribed.

Construing said charter, the court below held "that the city, under its power to regulate the use of streets, and under its general police power, has the right to require a compliance with regulations which either *wholly prohibit* relator from laying its wires under the streets, or which *regulate the manner* in which it may be done." [1]

These propositions cannot be reconciled. If relator has the right, under its charter, to lay either gas pipes or electric wires under the streets, in order to carry on its business, upon the sole condition that this be done "with as much dispatch and as little inconvenience to the public as possible," and (as admitted by the pleadings) is ready and willing to fulfill that condition, the city cannot, consistently with that charter, either prohibit relator from exercising such right, or annex any other condition thereto.

Act of March 2, 1857, amended by
Act of March 26, 1868, Sec. 1; [2]
State *ex rel. v.* Laclede G. L. Co., 102 Mo. 472, 484–6;
State *ex rel. v.* Greer, 78 Mo. 194–5;
Cooley's Const. Lim., p. 337 (*279): 712 (*577);
N. O. Gas Light Co. *v.* Louisiana Light Co., 115 U. S. 650, citing
State *v.* Cincinnati G. Co., 18 Ohio St. 262;
2 Dillon Mun. Corp. (4th ed.), Sec. 691;
Citizens St. Ry. Co. *v.* Memphis, 53 Fed. R. 732;
Home of the Friendless *v.* Rowse, 8 Wallace, 430;
St. Anna's Asylum *v.* New Orleans, 105 U. S. 362.

[1] *Supra*, p. 35.

[2] *Supra*, p. 4–7.

VIII.

Said city ordinance is not a valid exercise, as against relator, of the city's charter power to regulate the use of streets. Paragraph 2, section 26, article III of the City Charter (relied on for respondents) requires that power to be exercised by ordinance duly enacted by the Mayor and Municipal Assembly. But said ordinance does not contain, but only authorizes the Board of Public Improvements to prescribe, regulations as to the placing and securing of underground wires. It is not averred or shown by respondents that said Board have prescribed any regulations on that subject: but even if the city had power, under its charter, to regulate or control the exercise of relator's charter rights, it cannot delegate that power to the Board of Public Improvements.

Ruggles *v.* Collier, 43 Mo. 353;
St. Louis *v.* Clemens, 43 Mo. 395;
Sheehan *v.* Gleason, 46 Mo. 103;
Thompson *v.* Booneville, 61 Mo. 282;
Matthews *v.* Alexandria, 68 Mo. 116, 119;
St. Louis *v.* Russell, 116 Mo. 248, 255–7;
City of Nevada *v.* Eddy, 119 Mo. 557–8;
Birdsall *v.* Clark, 73 N. Y. 73, 76–7;
Thompson *v.* Schermerhorn, 6 N. Y. 92, 96;
Anderson *v.* Equitable Gas Light Co., 12 Daly, 462;
1 Beach on Pub. Corp'ns., § 558.
Re Quong Woo, 13 Fed. Rep. 229;
1 Dillon Mun. Corp. (4th ed.), Sec. 96 (p. 154), and cases cited.

IX.

Said ordinance is also void, as against relator, because, under color of the charter power of the city, by ordinance,

to regulate the use of streets, it absolutely prohibits the exercise by relator of charter rights essential to the conduct of its business, and expressly granted to that end, except at the arbitrary will of the Municipal Assembly, and then only on condition that relator shall first comply with each and all of the conditions of said ordinance, including the payment of a tax and the execution by relator of a penal bond and agreement, amounting to the express relinquishment by relator of valuable corporate franchises so granted to it.

The power of the city, under Paragraph 2, Section 26, Article III of its charter, to regulate the use of streets, relied on by respondents, does not include such denial to relator of its rights under an irrepealable charter.

Brennan *v.* Titusville, 153 U. S. 289, 300;
N. O. Gas Light Co. *v.* Louisiana, &c., Co., 115 U.S. 650;
St. Louis *v.* W. U. Tel. Co., 148 U. S. 92–103;
S. C. 149 U. S. 465, 470–1;
State ex rel. City of St. Louis *v.* Laclede Gas Light Co., 102 Mo. 472, 484–6;
Citizens' St. Ry. Co. *v.* Memphis, 53 Fed. R. 715, 732;
Toledo, &c. R. R. *v.* Jacksonville, 67 Ills. 37, 40–42;
Mayor, &c., *v.* Second Av. R. R., 32 N. Y. 261, 273–4;
St. Paul *v.* Traeger, 25 Minn. 248;
Tiedeman Lim. of Police Power, § 101, pp. 280, 281.

X.

The city ordinance in question, as against said charter rights of relator, is not valid as a police regulation. Relator's petition avers, and respondent's pleadings admit, that relator is ready to lay its wires with as much dispatch

and as little inconvenience to the public as possible, and in the manner particularly described in relator's reply; which is not averred or shown to be inconvenient or detrimental to the public, and which (as admitted by said demurrer) will not obstruct the use of the streets, while avoiding dangers hitherto existing.[1]

Under such circumstances, the police power cannot be invoked; *a fortiori*, when the enforcement of said ordinance, under color of police regulations, would deprive relator of essential rights and privileges granted by an irrepealable charter.

Gulf, &c., Railway *v.* Hefley, 158 U. S. 104–5;
N. O. Gas Light Co. *v.* Louisiana Light Co., 115 U. S. 650, 661;
N. O. Water Works Co. *v.* Rivers, 115 U. S. 674;
Louisville Gas Co. *v.* Citizens' Gas Co., 115 U. S. 683;
Mugler *v.* Kansas, 123 U. S. 623;
Brennan *v.* Titusville, 153 U. S. 300;
H. & St. Jo Railroad Co. *v.* Husen, 95 U. S. 472–4.
State *ex rel.* City of St. Louis *v.* Laclede Gas Light Co., 102 Mo. 472, 484–6;
State ex rel *v.* Corrigan St. Ry. Co., 85 Mo. 263, 282;
City of Kansas *v.* Corrigan, 86 Mo. 67, 70;
Sloan *v.* Pacific Railroad, 61 Mo. 31–2;
State *ex rel. v.* Greer, 78 Mo. 194–5;
Toledo, &c., R. R. *v.* Jacksonville, 67 Ills. 37, 40.
People *v.* Jackson P. L. Co., 9 Mich. 307;
Citizens' St. Ry. Co. *v.* Memphis, 53 Fed. R. 715, 732;
Cooley's Constitutional Limitations (5th ed.), pp. 706: 712–13;
Tiedeman on Police Power, Secs. 191: 194, Note 1;

[1] *Supra*, p. 20.

1 Hare's American Constitutional Law, p. 618;
2 Beach on Public Corporations, §§ 1229, 1249.

XI.

1. Under the city charter of St. Louis, the Street Commissioner is charged with the control, repair, etc., of the streets, and by city ordinance it is provided that no person shall make any excavation on any public street without written permission of the Street Commissioner.

2. Relator having applied to the Street Commissioner for such permit, in pursuance of its charter rights, it was his duty to grant it; which being refused, *mandamus* is the proper remedy.

St. Louis Charter, Article IV, Sec. 35 (II Rev. Stat. Mo., 1889, p. 2109);
Rev. Ord. St. Louis (1887), Art. I, Chap. 15, Sec. 568;[1]
High, Extr. Legal Remedies, Sec. 324;
1 Dillon Mun. Corp., §§ 827–8;
State ex rel. *v.* State Board of Health, 103 Mo. 29;
State ex rel. *v.* Tracy, 94 Mo. 217, 224–5.

[1] *Supra*, p. 9.

ARGUMENT FOR PLAINTIFF IN ERROR.

I.

QUESTIONS INVOLVED: JURISDICTION.

The federal question presented by this record is,—

Whether the city ordinance which was held valid by the Supreme Court of Missouri impairs the obligation of the contract contained in the charter of relator, plaintiff in error?

The decision of this question by this Court necessarily involves the further questions presented by the record as to the existence, validity and proper construction of said charter. This Court has jurisdiction to determine all said questions in this cause.

The opinion of the court below[1] is made part of the record in this cause, not only by the terms of the final judgment therein,[2] but by Section 3 of the amendments to the Missouri Constitution, adopted November, 1890, by which the Supreme Court was reorganized upon its present basis.[3]

The record shows that relator claimed the right, under its charter, granted by the State of Missouri in 1857, as

[1] *Supra*, pp. 29–35.
[2] Printed Record, p. 61.
[3] Mo. Session Acts, 1889, p. 322, Sec. 3.

amended in 1868, to carry on the business of lighting the City of St. Louis by electricity; and to that end, to lay under the streets of said city suitable pipes or conduits for the electric wires properly required therefor.[1] Respondents, the City of St. Louis and its Street Commissioner, denied that right on the ground, *inter alia*, that relator had not complied with a city ordinance, enacted after 1868, prohibiting any corporation to lay such wires underground unless authorized by the Municipal Assembly, and then only upon compliance by such corporation with certain conditions therein prescribed.[2] To this relator replied that the enforcement of said ordinance would be a denial of its rights under said charter, and an impairment of the obligation of the contract of the State of Missouri contained therein.[3] The court below held said ordinance valid, and on that ground alone denied to relator the right so claimed by it.[4] Thus, by the judgment below, was drawn in question the validity of a city ordinance enacted under the authority of the State of Missouri, on the ground of its repugnance to Section 10 of Article I of the Constitution of the United States, prohibiting any State from passing a law impairing the obligation of a contract; and the decision was in favor of its validity.

That this Court has jurisdiction, on that ground, under U. S. Rev. Stat., Sec. 709, to re-examine said judgment, is not denied, and is beyond any doubt.

But respondent below denied relator's right to relief on the further grounds (1) that the Act of 1868, amending its charter, was unconstitutional and void, (2) that said charter expired in 1887, and (3) that under said charter relator was not empowered to make, sell or distribute electricity for lighting purposes. Including these, the

[1] *Supra*, p. 10.
[2] *Supra*, pp. 13–14.
[3] *Supra*, pp. 23–27.
[4] Opinion, *supra*, p. 35.

questions presented by the record were thus stated by the court below: [1]—

First. Is the Act of March 26, 1868, unconstitutional, as being in conflict with Section 2, Article 8 of the Constitution of 1865?

Second. Is said Act void as being in conflict with Section 25 of Article 4 of said constitution?

Third. Did the charter of relator expire by limitation at the end of thirty years from the date of the Act of March 2, 1857?

Fourth. Do the powers granted relator include the right to manufacture, sell or distribute electricity for lighting purposes?

Fifth. Has relator the right, under its charter, to place its wires under ground without the assent of the municipal authorities and without compliance with the requirements of the valid ordinances of the city?

It is manifest that the enforcement of said ordinance cannot impair the obligation of a contract by the State of Missouri with relator if no such contract exists, or if, upon a proper construction of said charter, relator never possessed the right denied to it by the court below. The decision by this Court, therefore, of the federal question above stated, necessarily involves the decision of the remaining questions. This Court has repeatedly affirmed its jurisdiction, independently of the State court, to decide for itself all such questions.

In *Mobile & Ohio R. R. Co.* v. *Tennessee*, 153 U. S. 492–3, this Court said:—

"It is well settled that the decision of a State court

[1] *Supra*, pp. 29–30.

holding that, as a matter of construction, a particular charter or a charter provision does not constitute a contract, is not binding on this court. The question of the existence or non-existence of a contract in cases like the present is one which this court will determine for itself, the established rule being that where the judgment of the highest court of a State, by its terms or necessary operation, gives effect to some provisions of the State law which is claimed by the unsuccessful party to impair the contract set out and relied on, this court has jurisdiction to determine the question whether such a contract exists as claimed, and whether the State law complained of impairs its obligation." (Id., p. 495.) "The grounds upon which the Supreme Court of the State held that the contract, claimed by the railroad company under the eleventh section of its charter, was invalid, in no way affects the jurisdiction of this court. The legal existence of the contract itself, and its proper construction, is necessarily involved in the question of the alleged impairment of the obligation thereof."

So, in *Huntington* v. *Attrill*, 146 U. S. 684, it was said: —

"The case, in this regard, is analogous to one arising under the clause of the Constitution which forbids a State to pass any law impairing the obligation of contracts, in which, if the highest court of a State decides nothing but the original construction and obligation of a contract, this court has no jurisdiction to review its decision; but if the State court gives effect to a subsequent law, which is impugned as impairing the obligation of a contract, this court has power, in order to determine whether any contract has been impaired, to decide for itself what the true construction of the contract is. *New Orleans Water Works* v. *Louisiana Sugar Co.*, 125 U. S. 18, 38."

In *Scott* v. *McNeal*, 154 U. S. 45, the ruling above quoted was cited and affirmed.

So, in *Bryan* v. *Board of Education*, 151 U. S. 650, the Court said: —

"Did the [subsequent] act thus interpreted, impair the

obligation of any contract that the plaintiffs in error had in reference to that college? It certainly did, if the alleged contract forbade the removal of the Institute from Millersburg, except with the assent of the plaintiffs and those in whose behalf they sue. So that it is necessary to inquire as to the existence and effect of the alleged contract. And that question must be determined by this court upon its own judgment, independently of any adjudication by the State court. *Jefferson Bank* v. *Skelly*, 1 Black, 436, 443; *Wright* v. *Nagel*, 101 U. S. 791, 794; *Louisville & Nashville Railroad Company* v. *Palmes*, 109 U. S. 244, 254, 257; *Louisville Gas Co.* v. *Citizens' Gas Co.*, 115 U. S. 683, 697; *Vicksburg, &c., Railroad Co.* v. *Dennis*, 116 U. S. 665, 667. If there was no such contract as is alleged, then no right, secured by the National Constitution, has been denied by the decree below."

The court below decided only that said ordinance was valid, and "assumed, without deciding," that relator is "an existing corporation, possessing all the powers, rights and privileges its charter purports to confer upon it; this for the following reasons stated in its opinion:[1] —

"The city is not made a party to this proceeding, and we do not deem it necessary in this case to pass upon any questions that do not directly concern the duties of the Street Commissioner. We will not therefore consider, or express an opinion upon, any question involving the right of relator to exercise the rights, or enjoy the franchises which appear to have been granted under the Acts of the General Assembly mentioned in the statement."

That opinion was filed when the court below overruled relator's demurrer to and motion to strike out parts of the return to the alternative writ, made by the Street Commissioner, then sole respondent.[2] Relator then filed its reply, putting in issue the several averments in the return, setting out said ordinance in full, which was only in part set

[1] *Supra*, p. 30.

[2] *Supra*, pp. 2: 11.

out in said return[1] and raising, by express averment, the federal question above stated. To this reply the respondent, Murphy, demurred: after which, the City of St. Louis, by consent and leave, was made a party to the suit, adopting as its own said return and demurrer; all parties desiring a decision upon all said questions. The court below, however, without further argument, sustained said joint demurer, "for the reasons given in the opinion heretofore rendered in this cause, to which reference is hereby made as part of this judgment."[2] In other words, the court below still assumed, without passing upon it, the existence and validity of the contract with the State of Missouri relied on by relator, deciding only that the obligation of such contract was not impaired by the ordinance complained of.

But since, as this court holds,[3]— "If there was no such contract as is alleged, then no right secured by the National Constitution has been denied by the judgment below"— the existence, validity and true construction of relator's charter must first be determined by this Court.

II.

VALIDITY OF RELATOR'S CHARTER.

The amendatory Act of March 26, 1868, is not void as contravening Section 2 of Article VIII. of the Missouri Constitution of 1865, nor was said Act an act reviving or re-enacting the Act of March 2, 1857, as by respondent contended.

As will presently appear, the Supreme Court of Missouri, in a proceeding instituted by the City of St. Louis

[1] *Supra*, p. 15.
[2] *Supra*, p. 3: Pr. Rec., p. 61.
[3] Bryan *v.* Board of Education, *supra*.

against this plaintiff *in October, 1890*, directly adjudged the Act of March 26, 1868, and plaintiff's charter as amended thereby, to be valid and in force at that date, and cited with approval two previous decisions to the same effect. Plaintiff in error therefore contends that this question is *res judicata*. But since respondents' contention against its validity will doubtless be renewed in this Court, on the grounds urged below, these will first be considered.

It will be observed that the validity of the Act of March 2, 1857, is not questioned. Respondents' return admits that by said Act relator became a body corporate.[1] The Missouri Constitution in force at that date was that of 1845, which contained only two restrictions upon the power of the General Assembly to enact laws, both relating to slavery;[2] which was therefore subject to no other restriction except those contained in the Constitution of the United States.[3] In *Home of the Friendless* v. *Rowse*,[4] this Court held valid and irrepealable a charter granted under it, perpetually exempting from all taxation a private corporation created thereby. The Act of March 2, 1857, being in terms a present grant of corporate powers, without any condition precedent, the corporation came into being upon the acceptance of the charter by the organization which was effected in 1857, as admitted by respondents' demurrer.[5] Respondents' sole contention as to this Act was, that by the terms of Section 9 thereof, the corporate rights thereby granted expired on March 2, 1887;[6] which will be presently considered. But the Act of March 26, 1868, was

[1] *Supra*, p. 11: Pr. Rec., p. 24.

[2] Mo. Const. 1845, Art. 3, Sec. 26: R. S. Mo. 1845, pp. 32–3.

[3] Giozza *v.* Tiernan, 148 U. S. 661.

[4] 8 Wallace, 430, affirmed in *St. Anna's Asylum* v. *New Orleans*, 105 U. S. 362.

[5] St. Joseph, etc., Ry. Co. *v.* Shambaugh, 106 Mo. 566–7.

[6] *Supra*, p. 12: Pr. Rec., p. 27.

attacked as unconstitutional and void, because in conflict, as alleged, with Section 2, Article VIII, and also with Section 25, Article IV, of the Missouri Constitution of 1865.

Article VIII, Section 2 of the Missouri Constitution of 1865, is in the words following: —

"II. No law shall be passed, *reviving* or *re-enacting* any act heretofore passed, creating any private corporation, where such corporation shall not have been organized and commenced the transaction of its business, within one year from the time such act took effect, or within such other time as may have been prescribed in such act for such organization and commencement of business."

It was averred in respondent's return,[1] —

"Respondent further shows unto the court that the Laclede Gas Light Company did not within one year from the time the Act of March 2nd, 1857, took effect, organize, neither did it commence the transaction of its business within one year after the said Act of March 2nd, 1857, took effect; but on the contrary, said Laclede Gas Light Company did not *commence business* until, to-wit, the year 1873, *and therefore* respondent avers that the Act approved March 26th, 1868, was in conflict with Par. 2, Sec. 1, Art. 8, of the Constitution of 1865; and respondent further avers that said Act of March 26th, 1868, was an Act reviving and re-enacting the Act of March 2nd, 1857."

In reply to this, relator averred[2] that by Section 8 of the Act of March 2, 1857 (its original charter), it was exempted from the operation of Sections 6 and 7 of "An Act concerning corporations," approved November 23, 1855 (being the general corporation law in force in 1857), which were as follows: —

"Sec. 6. If any corporation hereafter created by the legislature shall not organize and commence the transaction

[1] *Supra*, pp. 11-12: Pr. Rec., p. 26.

[2] *Supra*, p. 15.

of its business within one year from the date of its incorporation, its corporate powers shall cease.

Sec. 7. The charter of every corporation that shall hereafter be granted by the legislature shall be subject to alteration, suspension and repeal in the discretion of the legislature."

The relator was therefore exempted by the Act incorporating it from the requirement to organize or commence business within one year from the time said Act took effect, and no time was prescribed in said Act for such organization and commencement of business: and being also exempted from the operation of Section 7 of said Act of November 23, 1855, relator's charter became and was an irrepealable contract of the State of Missouri. But it was further averred that relator did completely organize as a corporation, pursuant to its charter, during the year 1857, and did commence business long before the year 1873: which averments were admitted by respondents' demurrer to said reply.

It is perfectly clear, we submit, that the Act of March 26, 1868, cannot be held unconstitutional or void on the ground that it was a law such as described in Section 2 (wrongly designated in said return as Paragraph 2 of Section 1) of Article VIII of the Constitution of 1865, which forbids the legislature to pass any law *such as described in that section*.

It is a fundamental rule, emphasized by numerous decisions of the Supreme Court of Missouri, that in determining whether an Act of the Legislature, enacted in due form, was passed in violation of the Constitution, the courts will always presume such Act to be constitutional and valid until the contrary is shown beyond any doubt.

In *State ex rel.* v. *C. G. &c. R. R. Co.*, 48 Mo. 470–71, that Court said: —

"No rule of construction is better established, both upon

principle and authority, than that Acts of the legislature are to be presumed constitutional until the contrary is clearly shown; and it is only when they manifestly infringe on some provision of the Constitution that they can be declared void for that reason. In cases of doubt, every possible presumption, not directly and clearly inconsistent with the language and subject-matter, is to be made in favor of the constitutionality of the Act."

In the important case of *State ex rel. Maggard* v. *Pond*, 93 Mo. 606, 618–19, in which was upheld in 1887 the constitutionality of the "Local Option Act," that court said: —

"With the policy of the law, the wisdom or want of it in its enactment, we have no concern; that belongs to the domain of the legislature. Our business is to declare what is the law, and not to make laws. When the constitutionality of a law is assailed, before we can assume to declare it void, and thus erase it from the statute books, its invalidity must be made plainly to appear. *Stephens* v. *Bank*, 43 Mo. 390."

In *Lynch* v. *Murphy*, 119 Mo. 163, 174, decided by that Court *in banc* December 23, 1893, upholding against numerous objections the validity of an Act alleged to be unconstitutional, the Supreme Court of Missouri said: —

"In passing upon the constitutionality of the law now under consideration, we must concede to the legislators who enacted it the same sincerity of purpose, the same regard for their oaths to support the constitution of the State, and the same reverence for the constitution that we ourselves have; and unless we are satisfied beyond a reasonable doubt that the law is unconstitutional, it is our duty to uphold it."

And in *Pine Grove* v. *Talcott*, 19 Wallace (86 U. S.), 666, this Court said: —

"It is said the Act is in conflict with the constitution of

the State. It is an axiom in American jurisprudence that a statute is not to be pronounced void upon this ground unless the repugnancy to the constitution be clear and the conclusion that it exists inevitable. Every doubt is to be resolved in support of the enactment."

No law can be held unconstitutional or void on the ground that its passage by the legislature was prohibited by Section 2 of Article VIII of the Constitution of 1865, —

Unless it is a law *reviving* an Act passed before July 4, 1865, or is a law *re-enacting* an Act passed before July 4, 1865;

Nor unless the Act *revived* or *re-enacted* was an Act creating a private corporation;

Nor unless the corporation created by such Act failed to commence the transaction of its business, — either within one year from the time such Act creating it took effect,

or within *such other time as may have been prescribed by such Act* for such organization and commencement of business.

So much is perfectly clear on the face of the constitutional provision.

But the question arises — what is meant by "an Act *reviving* or *re-enacting* an Act" ?

In St. Jo. etc. R. R. Co. v. *Shambaugh*, 106 Mo. 557, 568, decided in 1891, the court below passed directly on that question, upholding the constitutionality of an Act amending a railroad charter, alleged to be invalid under this same section of the constitution of 1865. Said the court (quoting that section): —

"The above constitutional provision is not absolute, that is to say, it does not prohibit the legislature from enacting laws reviving prior acts creating private corporations *in all*

cases. The power to enact such laws remains in the legislature, except in the specified cases. Now the act in question does not on its face show that it comes within the prohibited cases. On its face it is a valid law. The principle of law is too well settled to call forth citation of authorities, that an act of the legislature will be presumed to be constitutional until its unconstitutionality is made to appear. There is nothing in this record to show that this act falls within the prohibited cases. In the first place the prohibition against reviving charters *implies that the charter to be revived is lifeless*. On this record the company was *an existing one* with perpetual succession *at the date of the alleged reviving act*."

It was further held in that case[1] —

" While the Constitution of 1865 prohibited the creation of private corporations by special laws, and contained other restrictions against special legislation, still it was held by this court that the legislature could, by a special act, amend special charters previously enacted. *State ex rel. Circuit Attorney* v. *Railroad*, 48 Mo. 468 " (decided in 1871).

It is not averred, nor was contended by respondents, that the *Act of March 2, 1857*, was " lifeless," or was not in full force, in 1868. On the contrary, their return avers[2] that by the terms of Section 9 thereof, that Act *expired* on March 2, 1887, viz., at the end of the thirty years limited by that section; and is therefore admitted to have been in force until that date.

It follows from the decisions above cited (1) that the section in question did not include or relate to any act not falling within the precise description in said Section 2, Article VIII; also (2) that the prohibition against *reviving* even an act such as therein described, applies only to charters already " lifeless,"— that is, that no law which amends or

[1] 106 Mo., p. 569.

[2] *Supra*, p. 12: Pr. Rec., p. 27.

affects the charter of a private corporation is an act *reviving* that charter, *if at the date of the alleged reviving act such charter was still in force;* also, (3) that since every presumption is made in favor of the validity of a law attacked as unconstitutional, that presumption will prevail unless the record clearly discloses the contrary.

Further light is thrown upon the intent of this constitutional provision by reference to the general law concerning corporations in force when it was adopted.

The constitutional provision under consideration was first adopted in 1865, as Section 2 of a new article (VIII) concerning "Banks and Corporations." Section 4 of that article provided that corporations might be formed under general laws, "but shall not be *created* by special Acts, except for municipal purposes." Before 1865, many hundreds of private corporations had been created by special Acts, many of which had expired by non-user, under Section 6 of the general corporation law above quoted. The manifest purpose of Section 2, Article VIII was to prevent these dead corporations from being resurrected by the passage of laws purporting to *revive* or *re-enact* such "lifeless" charters, thus evading the prohibition in Section 4 against *creating* private corporations by special Acts. That this was the construction placed on Section 2 by this Court in the Shambaugh case, the preceding citation shows.

But it is also evident that in respect of a private corporation whose charter specially exempted it from the operation of Section 6, of the General Corporation Law of November 23, 1855, above quoted, *and prescribed no other time within which such corporation should organize and commence business*, the prohibition in Section 2, Article VIII of the Constitution of 1865 could have no application whatever. Such a charter would not fall within the provisions of said Section 2 as to the time either of organizing or of commencing business; being (1) exempted from the one-year

requirement of the general law, and (2) *no "other time"* being prescribed therein for doing either. Such case is plainly within the ruling of the Supreme Court of Missouri in the *Shambaugh* case, that power to enact a law reviving or re-enacting prior acts creating private corporations still remained in the legislature, *except in the cases specified in Section 2.* The law amending the charter of the St. Jo. & Iowa R'y Co., was therefore held valid, as not within Section 2 of Article VIII of the Constitution of 1865.

In the light of these considerations, we submit that it is perfectly clear that the Act of March 26, 1868, is not "a law *reviving* or *re-enacting*" the Act of March 2, 1857, within the meaning of Section 2, Article VIII of the Constitution of 1865: because,—

1. Said Act of March 26, 1868, does not purport to *revive* or to *re-enact* the Act of March 2, 1857, but purports to be, and plainly is, an Act to *amend* said Act; something essentially different, and which was clearly within the power of the legislature.[1]

2. Said Act of March 2, 1857, was not "lifeless" when the Act of March 26, 1868, was passed, but was in full force. Respondents' return not only concedes this, but avers that it remained in force nineteen years thereafter, and *expired in 1887.*

3. The Act of March 2, 1857, and the corporation created thereby, was expressly exempted, by Section 8 of said Act, from the operation of Section 6 of the General Corporation Law of 1855 above quoted, *and no other time was prescribed in said Act within which said corporation should organize and commence business.*

[1] St. Jo., etc., Ry. Co. *v.* Shambaugh, *supra.*

In the *Shambaugh* case, *supra*, the Supreme Court of Missouri construed the word *reviving*, as used in Section 2, Article VIII, without expressly mentioning or construing the word *re-enacting*. But it is evident that these two words, in that section of the constitution, mean the same thing. If there be any distinction between them, it would be expressed by saying that an Act such as therein mentioned would *re-enact* the former *law* which was no longer in force, and would thereby *revive* the "lifeless *charter;*" but it is clear that both words are used interchangeably in the section, for an Act still in force can no more be *re-enacted* than a charter which has not expired can be *revived*.

Nevertheless, it was contended for respondents below that the Act of March 26, 1868, did *re-enact* the Act of March 2, 1857. To *enact*, it was said, means *to enact again;* and *to enact* (citing Webster's Dictionary) *to make into a law;* therefore, to re-enact means "to do such acts over again." Hence, it was argued —

"The Act of 1868 *re-enacts* the Act of 1857. The Act of 1857, in Sec. 5, conferred rights 'during the continuance of this act,' that is, until 1887. The Act of 1868 undertakes to confer these rights *forever*, *thereby* the Act of 1868 *re-enacts the act of 1857*, creating the Laclede Gas Light Company, and if the act is constitutional, according to relator's contention, extended the life of the corporation from 1887 to an unlimited period of time, and *at the same time extended the rights and franchises*, which, according to the Act of 1857, would have expired in 1887, to an indefinite term. Without the Act of 1868, relator has no legal existence now and no right to any of the franchises claimed. It seems to me, therefore, too clear for argument, that the Act of 1868, *re-enacts* to a most essential and vital degree, the Act of 1857."

But if the word *re-enact* means, as thus contended, "to do such acts over again," it would seem very clear that when the legislature passes an Act purporting to *amend* a former Act, thereby assumed to be in full force, and such amendatory Act makes provisions concerning the subject-matter of the Act amended which are new and entirely different from those contained therein, as by enlarging franchises and repealing provisions contained in such prior Act, it is simply an abuse of words to say that by such amendatory Act it *re-enacted said former Act*, or was "doing over again" *what it did when it passed such former Act*. To do something different is clearly *not* to do the same thing over again.

It was also contended for respondents below that, conceding that the Laclede Gas Light Company was exempted from the operation of Section 6 of the Act of November 23, 1855, "that fact did not in any manner exempt said corporation or the legislature from the operation of Section 2, Article VIII of the Constitution of 1865." But this cannot be true if, as above shown, the Act of March 26, 1868, was *not an Act such as described in that section* — viz., an Act *reviving* or *re-enacting* any Act such as therein specified. The Act of March 26, 1868, was an Act to *amend*, and not an Act to *revive* or *re-enact* the Act of March 2, 1857, and was therefore not within that constitutional provision; and as held in *State ex rel.* v. *C. & G. R. R. Co.*, affirmed in *St. Jo. &c. R. R. Co.* v. *Shambaugh*, *supra*, the legislature of 1867 had full power to amend existing corporate charters.

III.

Said amendatory Act of March 26, 1868, is not void as being in conflict with Section 25 of Article IV of

the Missouri Constitution of 1865, as by respondents alleged.

Following is the constitutional provision referred to: [1] —

XXV. "No act shall be *revived* or *re-enacted* by mere reference to the title thereof; nor shall any Act be *amended by providing that* designated words thereof shall be struck out, or that designated words shall be struck out and others inserted in lieu thereof; but in every *such* case, the Act revived or re-enacted, or the Act or part of Act amended, shall be set forth and published at length as if it were an original Act or provision."

Said Section 25 of Article IV contains two distinct provisions, namely: —

(1) That no Act shall be *revived* or *re-enacted*, by *mere reference to the title* thereof:

(2) That no Act shall be *amended* by the legislature *in the particular manner or form of amendment specified* in said Section 25.

1. Obviously, the former of these provisions does not apply to the Act of March 26, 1868. That Act purports to and does amend the Act of March 2, 1857, not "*by mere reference to the title* thereof," but by new enactments enlarging the powers of said corporation, which, as will presently be shown, completely fulfil the remaining affirmative requirements of the constitutional provision in question.

2. As to the second prohibition in Section 25, Article IV, it is clear that no law can be held void as contravening its terms,—

Unless such law amends a prior Act,—

by providing that designated words thereof shall be struck out, or

[1] Gen. Stat. Mo. 1865, p. 31.

by providing that designated words shall be struck out and others inserted in lieu thereof:

It being further prescribed that,

In every *such* case,— that is, in every case where an Act is amended

by providing that designated words shall be struck out, or

by providing that designated words shall be struck out and others inserted in lieu thereof,—

the Act or part of Act amended shall be set forth and published at length as if it were an original Act or provision.

It was contended for respondent below that the Act of March 26, 1868, violates this requirement, because, as it was said:—

"It refers to 'all the rights, privileges and franchises granted to it by the 5th section of the act to which this act is amendatory,' which language is absolutely unintelligible without reference to Sec. 5 of the Act of 1857, and reading into the Act of 1868, the provisions of the Act of 1857, which conferred such rights, privileges and franchises; and that it strikes out from the 5th Section of the Act of 1857, the words 'during the continuance of this act,' and substitutes therefor the word 'forever;' and, in that, the Act of 1868 attempts to repeal Sec. 6 of the Act of 1857, by simply employing the following language 'and the 6th Sec. of said act, to which this act is amendatory, is hereby repealed.'"

Referring presently to the decisions of the Supreme Court of Missouri by which a settled construction has been placed upon this clause, let us consider what is the plain meaning of those words, taken in their ordinary sense, and in connection with the methods of legislation in use prior to 1865.

It is clear, we confidently submit, that this restriction applies only to a *particular method or form of amendment*, of which the Session Acts before 1865 afford numerous examples, and which the framers of that constitution specially prohibited in words so precise as to leave no doubt what they meant.

In any volume of Missouri Session Acts prior to 1865, will be found illustrations of at least six different forms, theretofore adopted by the legislature in framing amending Acts, which may be briefly described as follows. The former Act is amended,—

(1) Without repealing or altering any existing section, by adding entirely new sections thereto: *e. g.*, the Act of March 14, 1859 (Mo. Acts 1858–9, p. 438), amending Chap. 164, R. S. 1855, concerning change of venue in civil cases: also Act of March 20, 1860 (Acts 1859–60, called sess., p. 5), amending the attachment act (R. S. 1855, p. 236, Ch 12); or

(2) By expressly repealing a section or sections designated by number, and enacting, at length, different provisions on the same subject; *e. g.*, Act of January 16, 1860 (Acts 1859–60, p. 526), amending Act of March 14, 1859 (Acts 1858–9, p. 448); or

(3) By enacting that a designated section or sections of an existing Act "be so amended that" — or "be and is hereby amended so that" — after which the intended amendment is set forth in full, differing, sometimes entirely and sometimes only as to certain words, from the prior Act; *e. g.*, Act of February 15, 1864 (Acts 1863–4, p. 28), amending the general law concerning divorce (1 R. S. 1855, p. 662); or

(4) By enacting that an existing Act, or a designated section or sections thereof, "be and is hereby amended *so as to read*" — after which the intended amendment is set forth, sometimes differing entirely, and sometimes only as to certain words from the Act or section amended; *e. g.*, Act of Feb. 13, 1864 (Acts 1863–4, p. 110), amending the

Act of Dec. 4, 1855, concerning county treasuries (1 R. S. 1855, pp. 519, 530); or

(5) By expressly repealing a designated section or sections, and enacting complete new sections, differing from those repealed *only in omitting certain words or omitting certain words and substituting others therefor; e. g.*, Act of February 5, 1864 (Acts 1863–4, p. 279) amending Act of January 16, 1860 (Acts 1859–60, p. 256, sec. 12); or

(6) Without adopting either of the preceding methods, by simply enacting that *designated* words in the act amended shall be struck out and other *designated* words inserted in lieu thereof; *e. g.* Act of November 23, 1863 (Acts 1863–4, p. 112), amending the Act to provide for, etc., the State University (2 R. S. 1855, pp. 1494, 1499), which is in full as follows:—

"§ 1. That the third section of the second article of the act to which this is amendatory shall be so amended that the word 'eighteen' be stricken out and 'twenty-two' be inserted in its stead.

"This act to take effect and be in force from and after its passage."

Of these, form (6) alone answers to the description in Art. IV, Sec. 25, of the form of amendment thereby prohibited. It follows that this section does not prohibit either of the other forms of amendment above mentioned; for if either of those forms were adopted, it would not be true that an Act was amended —

"*By providing that* designated words thereof shall be struck out, *or that* designated words shall be struck out and others inserted in lieu thereof."

The words "*by providing that*" can have but one meaning — viz.: that the form, and *the only* form, of amending Act forbidden, is one *which in terms provides* that "designated words shall be struck out," etc.; for no amending Act which *does not so provide* is within that description.

It is equally clear that the words which follow those above quoted do not modify this intentionally precise description of the form of amendment prohibited. The remainder of the sentence is —

"But *in every such case* the act revived or re-enacted, or the act or part of act amended shall be set forth and published at length as if it were an original act or provision."

It does not say — "in every case," but — "in every *such* case," that is, in every case of amendment *such* as already described, namely, in every case in which an Act is amended "*by providing that* designated words thereof shall be struck out *or that*," etc., which clearly excludes every case other than the two thus particularly described.

Even if these words were ambiguous, the doctrine above cited would apply, that — "In cases of doubt, every possible presumption, not directly and clearly inconsistent with the language and subject-matter, is to be made in favor of the constitutionality of the Act: " but we submit that there is no ambiguity here. No language could more clearly specify the particular form of amendment prohibited, and to such a case applies with special force the general rule of interpretation, thus laid down by Judge Cooley, citing many cases,—

"Where a law is plain and unambiguous, whether it be expressed in general or limited terms, the legislature should be intended to mean what they have plainly expressed, and consequently no room is left for construction." Cooley Const. Lim., 5th ed., p. 68 (pp. *56–57).

But this is no new question. The construction contended for by relator is established by repeated decisions of the Supreme Court of Missouri, affirming the validity of amending Acts of great public, as well as private im-

portance, during the past twenty years. Upon these decisions, as that Court remarked in *State* v. *Bennett*,[1] the legislature has repeatedly acted; and it is respectfully submitted that were this Court now to reverse or ignore the doctrine thus established, it would so unsettle both private rights and the duties and powers of public officers hitherto securely resting upon these decisions, as to result in wide-spread confusion, if not disaster.

Following is a brief statement of the more important decisions above referred to.

In *Mayor &c. of Boonville* v. *Trigg*,[2] the only question was whether the Act of March 23, 1868,[3] amending *in part* section 1 of the Act of February 8, 1839,[4] incorporating the city of Boonville, was invalid, as not complying with Art. IV., Sec. 25, of the constitution of 1865.

Section 1 of the Act of 1839 (Boonville charter) reads as follows, omitting in part the description of boundaries:—

"§ 1. All that district of country within the following limits, to wit: beginning at the mouth of the branch below and east of Boonville," * * * (description of boundaries) * * * "thence north, to the beginning, shall be and is hereby erected into a city by the name of the city of Boonville; and the inhabitants thereof shall be and are hereby constituted a body politic and corporate by the name," etc. * * * (corporate powers set forth) * * * "may have a common seal and make and alter the same at pleasure."

The remaining twenty-nine sections of the Act provide in detail for the city government, etc.

The amending Act of March 23, 1868, reads as follows:—

"Section 1. That *so much of section one* of an Act entitled 'An act to incorporate the city of Boonville,' approved

[1] 102 Mo. 364.
[2] 46 Mo. 288.
[3] Mo. Acts, 1868, p. 191.
[4] Acts 1888-9, p. 294.

February 8, 1839, *as relates to* the bounds and limits of the city of Boonville, *be amended so as to read as follows:* 'all that district of country within the following limits, to wit: beginning at the southeast corner of,' etc., * * * (description of new boundaries) * * * 'thence east, following said township line to the place of beginning.'"

The above is all of section 1, and is *all of said amending Act which purports to amend said charter.* The only remaining section of said Act is as follows: —

"Section 2. The foregoing amendment shall take effect as soon as it shall be accepted by the inhabitants residing within said limits, and not before, in a manner following, that is to say" * * * (at a special election to be called for the purpose as provided).

Concerning this amending Act, it will be observed: —

1. That it does not amend the original charter "*by providing that* designated words thereof shall be struck out, or that designated words shall be struck out and others inserted in lieu thereof" — viz., in form (6) above mentioned; but provides that said act shall "be amended *so as to read*" — that is, in form (4) above mentioned. The necessary *effect* of this amendment is, however, *to strike out of section 1 of the Act amended certain words,* not designated in the amending Act, but indicated therein by description, as "*so much of section one* of an Act entitled," etc., "*as relates to the bounds and limits of the city of Boonville*" and *to insert in the Act amended, in lieu of the words thus* (*in effect*) *struck out,* a new description of the city limits of Boonville, which is set out at length in the remainder of section 1 of the amending Act, *no other part of the Act amended being set out therein.*

2. That the portion of the Boonville charter thus amended, viz.: "*so much of section one*" of said charter "as relates to the bounds and limits of the city of Boonville," is only part of a sentence: and that the description of the new city boundaries which the amending Act substitutes therefor is only a part of a sentence and is not by itself a complete enactment, *nor is even intelligible* without referring to and reading it in connection with the remainder of the section amended, viz., "shall be and is hereby erected into a city," etc., etc., to the end of that section.

Clearly, if Art. IV. Sec. 25 of the constitution required "the *part of act amended*" to be set forth and published at length, etc., in the amending Act, *in the sense* that the new Act should set forth *the entire section as it would read* when amended, this was not a compliance therewith. On that ground, the Circuit Court held the amending Act unconstitutional and void, as not complying with Art. IV. Sec. 25, of the constitution. On appeal, the defendant (Trigg), contended,[1] that this construction of that section was correct, on the ground that its object was "to force the legislature to so enact amendments that the courts and all others might see at a glance, and without referring to the old law, the new law and amendments in all its bearings," — which, it was said, this amending Act did not do.

But the Supreme Court reversed the judgment below, holding that "the constitution was strictly complied with," and the amendatory Act valid. After quoting in full Art. IV, Sec. 25, of the constitution, the court say:[2] —

"In this section it will be perceived that different provisions are made. Where an entire Act is revived or re-enacted, it must be set forth and published in whole. Where a whole Act is amended, the same course must be

[1] 46 Mo. 288-9.

[2] 46 Mo. 289.

pursued; but where a part of an Act is amended, the amendatory part only need be set out and published.

"Every person who is familiar with our past legislative history well understands the reasons which induced the insertion of this constitutional provision. Amendments were made in such a manner as to involve the law to which they pertained in inextricable confusion. Amendatory Acts were passed which required only the insertion of certain words, or the substitution of one phrase for another, in sections which were only referred to by their titles, but not published. After the amendments were so framed and clothed in doubt, obscurity and uncertainty, it was almost impossible to arrive at the real and actual intention. It was to obviate these difficulties that the requirement was made that every amendment, either to a whole Act or a part of an Act, should be set forth and published."

Certain provisions in the constitutions of Louisiana and Indiana, relied on by the defendants, are then referred to, but distinguished, and the court proceeds:—

"The constitution in these State sexpressly declares that where a section is amended, it shall be re-enacted and published at full length. *But our constitution only requires the Act or part of Act amended to be set forth and published.* That was done in this case. There was no striking out, or inserting words in lieu thereof, *but there was an amendment of part of the Act and the amendment was set forth and published entire. The constitution was strictly complied with.*"

A fortiori under this ruling, the Act in question amending the Laclede Gas Light Co. charter, complies with the constitutional provision. The intended *amendments* are not only set forth and published entire, but are on their face complete enactments, the effect of which is perfectly intelligible without referring to the Act amended; which is not true of the Act amending the Boonville charter, but which Act, nevertheless, was held to be in strict compliance with the constitution.

In *State* v. *Chambers*,[1] decided in 1879, the Act of April 17, 1877,[2] amending sections 1, 3 and 11, chapter 186 of the General Statutes of 1865, was called in question under Art. IV, Sec. 34, of the constitution of 1875, which contains a provision as to amending Acts, similar to section 25, Art. IV of the constitution of 1865, except that the last clause of the former reads — " but the words to be stricken out, or the words to be inserted, or the words to be stricken out and those inserted in lieu thereof, *together with the act or section amended*, shall be set forth in full *as amended*."

But said Act (of April 17, 1877) was held valid; the court again approving the rule in the Boonville case, and defining as follows (70 Mo. 628) the limits of the constitutional prohibition: —

" It will be observed that said sections 1, 3 and 11, as amended, are fully set out in the Act. Section 3 of said Act furnishes an illustration of *what was intended to be forbidden* by section 34, article 4 of the constitution. If said section *had only contained the words* 'Section 3 of said chapter 186 is hereby amended by striking out the words 'assault, battery, affray or other breach of the peace,' in the third and fourth lines of said section, and inserting in lieu thereof the words 'a misdemeanor,' the amendment *would have been in clear violation* of said constitutional provision."

This illustration of " what was intended to be forbidden by Section 34, Article IV, of the constitution " (of 1875)— which, as above shown, is more stringent than Art. IV, Sec. 25, of the constitution of 1865 — cannot be reconciled with the proposition that an amending Act which does not *provide for* striking out designated words, etc., but the *effect of which* is to substitute a new provision for an old

[1] 70 Mo. 625.

[2] Acts 1877, p. 281.

one, is void unless the entire new section, as it will read when amended, is set forth in the amending Act.

In *State* v. *Geiger*,[1] decided in 1877, the question was as to the validity of section 4 of the Act of March 9, 1872,[2] by which was amended section 33 of the general election law,[3] The defendant contended that said amending Act was void, because it did not set out in full the section amended, as required by Art. IV, Sec. 25, of the constitution (1865), nor in any manner refer thereto. But it was held valid, on the ground[4] that —

"The provision of the constitution above referred to was not directed against repeals by implication, or against original legislation, the effect of which would be to alter or modify previous laws; but it refers to such Acts only as are in terms amendatory in their character."

In *State ex rel.* v. *Draper*,[5] decided in 1870, it was also held that Art. IV, Sec. 25, of the constitution (1865) did not prohibit the amendment or repeal of former Acts by implication. Both these cases are affirmed in later decisions, below referred to.

In *Morrison* v. *St. Louis, I. M. & S. Ry. Co.*[6] was held valid the Act of April 17, 1877,[7] amending the Act of March 15, 1875,[8] concerning the collection of taxes, as not being in contravention of Art. IV, Sec. 34, of the constitution of 1875. The following extract from the opinion of the court[9] in terms limits the constitutional provision in question to enactments in form (6) above given.

"Under this constitutional provision, it is quite common for the legislature to first state that certain words

[1] 65 Mo. 306, 312.
[2] Acts 1871-2, p. 13.
[3] 1 Wagner's Stat., 1872, p. 570.
[4] 65 Mo. 313.
[5] 47 Mo. 29.
[6] 96 Mo. 602, 606.
[7] Acts 1877, p. 362.
[8] Acts 1875, p. 124.
[9] 96 Mo. 606.

of a specific section are stricken out and others inserted, and then set out in full the section as amended, *but the constitution makes no such requirement.* In former times, a practice had grown up of amending an Act, or a section of an Act, *simply by saying* that designated words were stricken out, or that they were stricken out and others inserted, leaving it to the reader to examine both Acts and make the erasure and substitution. *This practice the constitution prohibits*, and when a section of an existing statute is amended, the sections, as amended, must be set out in full; nothing more is required." (Citing *State* v. *Chambers*, 70 Mo. 626.)

In the important case of *State ex rel.* v. *Miller*,[1] decided in 1890, was called in question the validity, under Art. IV, Sec. 34, of the constitution (1875), of the act of March 30, 1887.[2] This Act, under the guise of a general law relating to cities having over 300,000 inhabitants, was passed for the sole purpose of reorganizing the St. Louis Board of Public Shools; to which end it changed in numerous and important particulars several special Acts under which that body existed, but only by new affirmative enactments, without setting forth or referring to any particular Act or section so amended.

Referring to said Art. IV, Sec. 34, the court say[3]

"The object of this section is sufficiently stated in *Morrison* v. *Railroad*, 96 Mo. 602. It is there shown that when an Act undertakes to amend a former statute, it is not sufficient *to say certain words are stricken out, or certain words inserted*, but the section as amended must be set out in full, *and this is all that is required.* Here it is true, portions of the special Act creating the school corporation are repealed or modified by this Act of March 30, 1887, *and the last named Act does not name the sections which are thereby repealed nor are the sections thereby modified set out in their modified form.* This may lead

[1] 100 Mo. 439, 446. [2] Act 1887, p. 272. [3] 100 Mo. 446.

to inconvenience in requiring a comparison of the old and new law, but such legislation is not prohibited by the provision of the constitution before quoted. The constitution of 1865 contained a provision much like the one now in question, under which it was held that repeals by implication were not prohibited. *State ex rel.* v. *Draper*, 47 Mo. 29; *State ex rel.* v. *Maguire*, 47 Mo. 35. The repealing clause of the Act now under consideration is no more, in effect, than a repeal by implication.

"This Act does not seek to amend any former law *by simply striking out designated words, or by inserting certain words, or by striking out words and inserting others in lieu thereof, and is not within the constitutional prohibition.*"

The last sentence directly sustains the construction above placed upon the constitutional provision in question, in its most stringent form.

State v. *Bennett*[1] is equally conclusive of the correctness of the conclusions above reached. The question was as to the constitutionality of the Act of February 17, 1875,[2] amending the Act of March 27, 1861, establishing the St. Louis Board of Police Commissioners, and the Act of March 13, 1867, amendatory thereof. It was claimed to be void, under Article IV, Section 25, of the constitution of 1865, in that it did not set out in full the sections of said prior Acts as amended. This objection, if valid, was fatal, both to the Act of February 17, 1875,[2] and that of March 13, 1867, each of which made important changes in the Act amended thereby, but only by affirmative enactments, without either republishing the old law or setting forth in full the new sections *as amended*. But the court upheld the Act as constitutional, citing *State* v. *Draper*,[3] *Mayor &c. of Boonville v. Trigg*,[4] and *State* v. *Chambers*,[5]

[1] 102 Mo. 356, 362-4.
[2] Acts 1875, p. 337.
[3] 47 Mo. 29.
[4] 46 Mo. 288.
[5] 70 Mo. 625.

This is far broader than the Missouri provision, and in terms applies to every case of an amended Act, in whatever form amended. Yet that court declined to construe it as here contended for by respondent. The opinion proceeds —

"The act before us does not assume, in terms, to revise, alter or amend any prior act or section of an act, but by various transfers of duties, it has an amendatory effect *by implication*, and by its last section it repeals all inconsistent acts. *We are unable to see how this conflicts with the provision referred to.* If, whenever a new statute is passed, it is necessary that all prior statutes modified by it by implication should be re-enacted and published at length as modified, then a large portion of the whole code of laws of the State would require to be republished at every session, and parts of it several times over, until, from mere immensity of material, it would be impossible to tell what the law was. * * * This constitutional provision must receive a reasonable construction, with a view to give it effect. The mischief designed to be remedied was the enactment of amendatory statutes in terms so blind that legislators themselves were sometimes deceived in regard to their effect, and the public, from the difficulty in making the necessary examination and comparison, failed to become apprised of the changes made in the laws. *An amendatory act which purported only to insert certain words, or to substitute one phrase for another in an act or section which was only referred to but not republished, was well calculated to mislead the careless as to its effect, and was sometimes drawn in that form for that express purpose.* Endless confusion was thus introduced into the law, and the constitution wisely prohibited such legislation. But an act complete in itself is not within the mischief designed to be remedied by this provision *and cannot be held to be prohibited by it without violating its plain intent.*"

The Act in question was therefore held to be valid under that provision of the Constitution of Michigan.

Plaintiff therefore insists that the Act of March 26, 1868,

was not in conflict with Section 25 of Article IV of the Constitution of 1865, but was and is a clearly constitutional and valid amendment of the Act of March 2, 1857.

IV.

Relator's charter did not expire on March 2, 1887. If the Act of March 26, 1868, was void, as alleged, then, since the City of St. Louis failed to purchase said company's property, its charter was extended to March 2, 1917, by Section 6 of the Act of March 2, 1857. But the amendatory Act of March 26, 1868, was valid, and granted to relator "to have, hold and enjoy FOREVER *all the rights, privileges and franchises granted to it by" said Act of March 2, 1857, as enlarged by said amendatory Act; and in virtue thereof relator now holds its franchises.*

By section 6 of the Act of March 2, 1857, the validity of which is not questioned, it was provided, —

"The said city shall have the right at the expiration of *twenty years from the time of the organization of said company*, under this charter, to purchase all the property and effects of the same, paying therefor to the same the value of such property and effects with twenty per cent added thereto, such value to be fixed by two appraisers. * * * If said city fail so to purchase said property and effects, then this charter *shall be and is hereby renewed and extended* for the further period of thirty years after the expiration hereof." [1]

By Section 9 of said Act it was to continue in force for thirty years from March 2, 1857.

It was averred by relator [2] and admitted by respondent's demurrer, that relator was duly organized under said charter in 1857, but that the City of St. Louis never pur-

[1] *Supra*, pp. 5–6.

[2] *Supra*, pp. 17–18.

chased or offered to purchase the property and effects of said company or any part thereof.

It follows that whether the Act of March 26, 1868, was unconstitutional and void, or was constitutional and valid, in either case relator's charter did not expire on March 2, 1887, but is still in force,—

Because (1) if the Act of March 26, 1868, was void, then the Act of March 2, 1857, remained in force without amendment; and, since it is admitted that the city never purchased or offered to purchase the company's property, Section 6 of said Act became operative in 1877, and said charter was "*thereby* renewed and extended for the further period of thirty years;" but (2) if the Act of 1868 was constitutional and valid, as an amendment of the Act of March 2, 1857, it empowered relator to hold and enjoy *forever* the corporate rights, etc., granted to it by the fifth section of the Act of 1857, thereby repealing Section 9 of said Act of 1857 as necessarily inconsistent therewith.

For the reasons above given, and also in view of the decisions of the Supreme Court of Missouri, presently referred to, the latter conclusion is inevitable.

It was contended below, however, that even though the Act of 1868 was constitutional and valid, yet, since that Act did not expressly repeal Section 9 of the Act of March 2, 1857, the corporate life of relator was still limited by that section to thirty years, and therefore expired on March 2, 1887. This argument was thus stated:—

"No change was made by the Act of 1868, in Sec. 1 or Sec. 9 of the Act of 1857, so that the Act of 1857, as amended by the Act of 1868, if the Act of 1868 is a legal act, would read in this way: The company is given the right in Sec. 1 to have 'perpetual succession;' is given the right by Sec. 5 to enjoy its franchise 'forever;' and Sec. 6 which gives the city an option within twenty years, and extends the life of the company an additional thirty years

if the city did not purchase, is stricken out; and by Sec. 9 the continuance of the act, as thus amended, is limited to thirty years from the date of its passage, to wit, to March 2d, 1887.

"Thus Sec. 1 confers the capacity of immortality; Sec. 5 gives the company *unlimited* duration; and Sec. 9 *limits* the life of the company to thirty years after March, 1857.

If we may assume that such a contention will be renewed in this court, it refutes itself. It represents the legislature as expressly granting in one section, by the word "*forever*," what was at the same time purposely withheld, it is said, by not expressly repealing another section. It disregards the ruling in *State* v. *Draper*,[1] affirmed in *State ex rel.* v. *Miller*,[2] that the Constitution of 1865 sanctioned amendments by implication. That constitution, said the Court —

"— has not said that when an Act is passed inconsistent with a preceding one, so that both cannot stand, the latter one shall be void, and the earlier one shall prevail, but has left the law as it always has been, viz., that when two statutes are inconsistent and repugnant, the last one enacted shall be considered in force."

Certainly the Act of 1868 could not mean that relator should enjoy *forever* the franchises referred to, and at the same time that its corporate existence should expire in 1887, nineteen years after the date of the amending Act. In the recent and important case of *State ex rel.* v. *Payne*,[3] the Supreme Court of Missouri,[4] while holding that the words "perpetual succession," without more, in the charter of a private business corporation, imported continuous, but not necessarily unlimited, duration, conceded the contrary if the word *forever* were used, as in *State* v. *Stor-*

[1] 47 Mo. 32.
[2] 100 Mo. 446.
[3] 31. S. W. Rep. 797.
[4] June, 1895.

mont,[1] in which the charter was held unlimited in duration.

Further proof, if any were needed, that such a construction is not only unreasonable, but impossible, is furnished by the circumstances under which the Act of March 26, 1868, was passed, as averred in relator's reply,[2] admitted by the demurrer, and fully set forth in the opinion of the Supreme Court in *St. Louis* v. *St. Louis Gas Light Co.*[3] In March, 1857, and thereafter until 1873, when the "Tripartite Agreement" was entered into between the City of St. Louis, the Laclede Gas Light Company, and the St. Louis Gas Light Company, the last named company, under its charter, granted in 1837, had the exclusive right of making and selling gas within the city limits; and in Section 3 of the Act of March, 1868, as remarked by the court below in the case last cited,[4] those rights were expressly recognized. In other words, although the Laclede Gas Light Company was in 1868, an existing corporation, having certainly nineteen and possibly forty-nine years to live, it was practically unable, except by permission of its rival, to do business. The legislature, to meet the wants of a large and growing city, saw fit to increase its powers, extend its territory, authorize the increase of its stock, remove the incubus of the city's right to purchase its property, and expressly grant to it unlimited duration; plainly intending (as the court remarked in that opinion)[5] that it "might obtain, if it could, from the St. Louis Gas Light Company, a waiver or abandonment of its right to exclude competition." Yet, it is said, the legislature, when it said *forever*, without *expressly* repealing Section 9 of the Laclede's original charter, meant *nineteen years!*

[1] 24 Kan. 686.
[2] *Supra*, pp. 16–17.
[3] 70 Mo., 69, 82, 119–20.
[4] 70 Mo. 120.
[5] 70 Mo. 120.

V.

The validity and duration of relator's charter, to wit, the Act of March 2, 1857, amended by the Act of March 26, 1868, are not open to question but are res judicatæ under three successive decisions of the Supreme Court of Missouri.

The decisions referred to were rendered in the three important cases of *St. Louis* v. *St. Louis Gas Light Co.*,[1] *St. Louis Gas Light Co.* v. *St. Louis*,[2] and *State ex rel. City of St. Louis* v. *Laclede Gas Light Co.*,[3] decided respectively in 1879, 1885 and 1890.

In the first two, the validity of the so-called "Tripartite Agreement," executed under date of February 28, 1873, by and between the City of St. Louis, the St. Louis Gas Light Co. and the Laclede Gas Light Co. (mentioned in relator's petition herein), was directly in question,— being denied by the city, which, for that purpose, amended its original petition and made the Laclede Company a defendant in the suit. In June, 1876, the Circuit Court, by interlocutory decree[4] adjudged the Tripartite Agreement void, sustained the city's claim to purchase the gas works of the St. Louis Gas Light Co. and placed its property in the hands of a receiver; and on February 12, 1877, finally decreed the title to the gas works in the city. That suit was then dismissed as to the Laclede Gas Light Co., but the St. Louis Gas Light Co. took an appeal to the St. Louis Court of Appeals, which affirmed the judgment below;[5] but the Supreme Court on appeal reversed that judgment and dismissed the city's bill. All the judges concurred, holding the Tripartite Agreement valid, and that this question was conclusive of the controversy.[6]

[1] 70 Mo. 69.
[2] 86 Mo. 495.
[3] 102 Mo. 473.
[4] 70 Mo. 91.
[5] 5 Mo. App. 484.
[6] 70 Mo. 115, 119–20, 121–2.

From the opinion of the Court, per Norton, J., we quote the following: [1] —

"The Laclede Gas Light Company obtained its right to make and vend gas, not from the St. Louis Gas Light Company, but from the act of the general assembly incorporating it, subject, of course, to the vested rights of the St. Louis Gas Light Company. When the act of 1857, incorporating the Laclede Gas Light Company, was passed, whereby it was authorized to make and vend gas only in a certain part of the city, *and when the amendatory act of 1868 was passed, whereby it was authorized to make and vend gas throughout the entire limits of the city*, the St. Louis Gas Light Company, by virtue of its charter, passed in 1837, had the right to exclude the Laclede Gas Light Company, as well as all other persons, from making and selling gas in the city. *This was evidently in the mind of the legislature when the act of 1868, amending the charter of the Laclede company, extending its right to sell gas through the entire limits of the city, was enacted;* and hence it was expressly provided therein that the right thus conferred could only be exercised in subordination to the vested rights of the St. Louis Gas Light Company to exclude all competition."

This was not *obiter dictum*, but necessary to the determination of the controversy. The question whether the tripartite agreement was valid necessarily involved the question of the corporate powers of each party thereto, and consequently the validity of the amendatory act of March 26, 1868. And one objection urged, both in the Circuit Court and in the court below, to the validity of that agreement, was the very point now under consideration, that the Act of March 26, 1868, was invalid, as in contravention of Section 25 of Article IV of the Constitution of 1865.

We quote as follows, from page 16 of the printed brief

[1] 70 Mo. 119–20.

of Leverett Bell, then City Counsellor, filed by him in the court below on behalf of the City of St. Louis, in the case referred to, on October 21, 1879; and to which, in the argument of the case at bar, the attention of the Court below was called. After referring to the original charter of the Laclede Gas Light Co., approved March 2, 1857, and the Act of March 3, 1857, amending the same, Mr. Bell said: —

"Upon March 26, 1868 (Laws of 1868, p. 187: Statement, p. 80), another amendatory Act was adopted, by which the rights granted by the 5th section of the original Act of March 2, 1857, were attempted to be granted to the company throughout the corporate limits of the city. But the Act of March 26, 1868, is inoperative, because it conflicts with Section 25 of Article IV of the Constitution of 1865, then in force, which provides that 'no Act shall be revived or re-enacted by mere reference to the title thereof;' * * * 'but in every such case the Act revived or re-enacted, or the Act or part of Act amended, shall be set forth and published at length, as if it were an original Act or provision. *French* v. *Woodward*, 58 Mo. 66."

The files of that case also show that on the same day was filed with Mr. Bell's brief in said cause, a printed copy of the opinion of Judge Gottschalk, stating the grounds on which the decree of the Circuit Court above mentioned was rendered in that case; to which also, in the argument of this cause, the attention of the Court below was called. From page 8 of that opinion we copy the following, in reference to said Act of March 26, 1868: —

"The Constitution provides that no Act shall be revived or re-enacted by mere reference to the title thereof, but in every such case, the Act revived or re-enacted, or the Act or part of Act amended, shall be set forth and published at length, as if it were an original Act or provision. Again,

by Section 32 of the Constitution, it is provided that if any subject embraced in an Act be not expressed in the title, such Act would be void as to so much thereof as is not expressed.

"The Act of 1868 violates both of these provisions. In the title it refers only to the Act of March 2, 1857, and in its body it attempts to repeal an Act passed March 3, 1857. Again, it pretends to amend or revive an Act, but entirely fails to set forth or publish the same at length. This can not be done (*French* v. *Woodward*, 58 Missouri, p. 66), and the Act of 1868 must therefore, and to that extent, be held unconstitutional and void."

This question is therefore *res judicata*, under the doctrine of the Missouri Supreme Court in *Chouteau* v. *Gibson*, that [1] —

"A decision made in a case by the highest court empowered to pass upon it, is conclusive upon the parties to the controversy, and their privies, who are not allowed afterward to revive it in a new proceeding for the purpose of raising the same on any other question. The matter in controversy has become *res judicata*, a thing definitely settled by judicial decision, and the judgment of the court imports absolute verity. Whatever the question involved — whether the interpretation of a private contract, the legality of an individual act, *or the validity of a legislative enactment*, the rule of finality is the same."

In the second case,[2] the Supreme Court again asserted the validity of that amendatory act. That was a suit by the St. Louis Gas Light Co. against the city, for gas furnished under the "Tripartite Agreement." The city again set up the invalidity of that agreement, but the Supreme Court overruled that defense as follows: [3] —

"2. Further defense is that the contract sued upon must bind all of the parties or none, and that the Laclede Gas

[1] 76 Mo. 47. [2] 86 Mo. 495. [3] 86 Mo. 499.

Company had no power to make the contract in question, and hence it is void as between the city and plaintiff. It is assumed, not decided, that the first branch of the proposition is correct, but the second is not true in point of fact *or law*. The sixth section of the act of March 2, 1857, incorporating the Laclede Gas Company, gave to it and the city power to make any contracts they deemed best, with regard to lighting a portion of the city, and to the city the right to purchase the property of the company at the expiration of twenty years. *This section, it is true, was repealed by the act of March 26, 1868, and hence the conclusion contended for is drawn.* But, by the fifth section of the act of 1857, that company had power within a defined district to light the same, to make and vend gas and gas-light, and to lay down pipes therein, and 'all other powers necessary to execute and carry out the privileges and powers' thereby granted. *All of these rights, privileges, and franchises are, by the same act of March 26, 1868, extended over the corporate limits of the city. This legislation shows no intention to take away from the Laclede Gas Company its powers to contract with the city, but on the contrary, its powers in this respect are extended over the entire city limits.* * * * The validity of this contract was affirmed in a suit between these parties (70 Mo. 69), and the conclusion here stated is but a corollary of what was then said. It is true, the precise point now urged was not then ruled, but it was only because the exigencies of that case did not require it."

The third case referred to[1] was an original proceeding in the Supreme Court, *at October Term, 1890*, by the State of Missouri, at the relation of the City of St. Louis, against the Laclede Gas Light Company (plaintiff in error), for a writ of mandamus to compel it to reduce the price of gas to private consumers from $1.25 to 90 cents per thousand cubic feet, as required by city ordinance 15,482, *approved March 31, 1890*. Respondent's return to the alternative writ alleged, among other defenses, that its

[1] 102 Mo. 472.

charter was an irrepealable contract with the State, under which it had the right to fix the price of gas made and sold by it, which price could not be diminished by either State or municipal legislation. Relator filed a general demurrer to the return, which was fully argued and decided on all points in favor of the Laclede Company. We quote from the opinion of the court, on the point above stated, as follows: [1] —

"III. The third point at issue, as already stated, presents the question whether the charter of the respondent company, granted by the State, contains such features of a contractual nature as forbid and prevent any interference therewith either by the State government or by any municipality representing the authority of that government. The respondent company exists by virtue of a special charter granted March 2, 1857, *as amended by an act approved March 26, 1868.*"

The court then briefly summarizes [2] sections 1, 5, 7 and 8 of the act of March 2, 1857 (original charter), also copying sections 6 and 7 of the act concerning corporations, approved November 23, 1855,— from the operation of which said company was expressly exempted by section 8 of said charter, and continues: —

"The fifth section of the original act incorporating the respondent gave it ample powers of contracting with the city for making and vending gas, etc., and the amendatory act made its franchises co-extensive with the boundaries of the city. This point was inferentially thus ruled in *City of St. Louis* v. *St. Louis Gas Light Co.*, 70 Mo. 69, and thus ruled directly in a later case,— *St. Louis Gas Light Co.* v. *City of St. Louis*, 86 Mo. 495.

"It is not open to doubt or dispute that this power to make and vend gas carries with it as an inevitable incident the right to *fix the price of the gas thus made and*

[1] 102 Mo. pp., 483–5.

[2] 102 Mo., p. 484.

sold. • • • So that, by the terms of the charter of the respondent company its right to fix the price of its product was as much a part of its charter as if it had been in terms set forth in section 5 of the original act of incorporation."

It will be observed that this was a direct proceeding against the Laclede Gas Light Company brought by the City of St. Louis in the name and by authority of the State of Missouri; in which the true construction and effect of the Act of March 26, 1868,— necessarily including the question of its validity as a legislative act,— were directly adjudicated by the Missouri court of last resort.

It is respectfully submitted that the contention of these respondents against the validity of relator's charter cannot be sustained except by disregarding or reversing these judgments, by which the Supreme Court of Missouri has held that the Laclede Gas Light Company lawfully holds and enjoys, under an irrepealable contract with that State, the rights and franchises granted to it by the Act of March 2, 1857, as amended by the Act of March 26, 1868. Upon the faith of those judgments, great sums of money have been invested in the stock and securities of this company by citizens of this and other States. Respondents admit, by their pleadings, that relator, exercising the franchises and fulfilling the duties set forth in said charter, not only is furnishing light by means of gas *and electricity* to many thousand private consumers in the city of St. Louis, but under contract with the city itself is lighting the public streets and alleys thereof by electricity and is under obligation to do so for a number of years to come; and that the very purpose of this application, made on the faith of the judgments of this court declaring that charter valid and irrepealable, is that relator may with the greatest convenience to the public, and the least danger to human life, fulfill its charter obligations.

It is under these circumstances that the City of St. Louis asks this Court to render a judgment in this proceeding, which shall not only deny to relator its rights, but shall accomplish that object by disregarding the plighted faith and repudiating the acknowledged obligations of the State of Missouri.

VI.

CONSTRUCTION OF RELATOR'S CHARTER: ELECTRICITY.

The grant by the State to relator includes the right to use electricity for illuminating purposes.

1. Relator's charter powers include (1) carrying on the business of artificial lighting, (2) making and vending gas, gas lights, gas fixtures and any substance or material which was in 1857 or might thereafter be used as a substitute therefor, and (3) all other powers necessary for said purposes.

2. Electricity is a substance, within the meaning of said charter, which relator has power to make and use, as a substitute for gas, in producing electric light as a substitute for gas light.

3. Carbon is a material, within the meaning of said charter, which relator is empowered to use as a substitute for gas in producing electric light as a substitute for gas light.

4. It is immaterial whether the art of producing light by electricity was known in 1857; but that it was then known the pleadings admit,[1] and the Court will take judicial notice.

[1] *Supra*, pp. 27:29.

It was contended for respondents below [1] that, even conceding the validity of relator's charter as claimed —

"Relator is not entitled to the relief asked for in this case, because respondent says that it has never by any Act been granted a franchise to make and vend electricity for any purpose whatever, but that whatever rights, privileges and franchises it ever enjoyed were confined to making and vending gas, gas lights, gas fixtures and any substance or material used as a substitute therefor, and that electricity, whether used for lighting or power purposes, is not a substance or material, and hence relator has not any right to make or vend the same anywhere."

The rule by which the charter of a business corporation is construed, to determine its corporate powers, is well settled, and is thus stated by the Supreme Court of Missouri in *Henning* v. *U. S. Insurance Co.*: [2] —

"Corporations, where they are not restrained in any particular manner by their charter, may adopt all reasonable modes in the execution of their business which a natural person may adopt in the exercise of similar powers."

In *Kitchen* v. *Cape Girardeau, &c., R. R. Co.*,[3] that court said:—

"In the absence of charter restrictions, the power of a corporation to make contracts is usually measured by the general objects and purposes of the incorporation. It is always presumed that a corporate body may make any proper contract whose scope and tendency are manifestly to forward the design of its legislative creation."

In *Callaway M. & M. Co.* v. *Clark*,[4] that court held that a company incorporated for the purpose of mining

[1] Supra, pp. 12, 14: Pr. Rec., pp. 27, 28.
[2] 47 Mo. 432.
[3] 59 Mo. 517-18.
[4] 32 Mo. 305, 308.

and transportation of coal, with power to construct a railroad from its coal lands to the Missouri River, and to purchase, hold, etc., any other property needful "and purchased only for the carrying on of its business of mining and manufacturing in said County of Callaway" had corporate power to purchase and use a steamboat for the transportation of its coal from the terminus of its railroad across the Missouri River.

The same general rule is found in the most approved treatises on the law of corporations,[1] and was sanctioned by this Court in *Green Bay, &c., R. R. Co.* v. *Union Steamboat Co.*,[2] citing *Thomas* v. *R. R. Co.*,[3] and in *Ft. Worth City Co.* v. *Smith Bridge Co.*[4]

The charter powers in virtue of which relator claims the right here in question are set forth in Section 5 of the Act of March 2, 1857, as amended by Section 1 of the Act of March 26, 1868.[5]

By these sections, the right is expressly granted to relator, anywhere within the corporate limits of the City of St. Louis, as then or thereafter established, —

(1) To carry on the business of lighting said city: also;

(2) To carry on the business of making and vending gas, gas-lights and gas-fixtures, and of making and vending any substance or material that might, at the date of said charter or thereafter, be used as a substitute *therefor*, — that is, as a substitute for gas, or for gas-lights, or for gas fixtures; and relator is further authorized,

(3) *To that end* to establish and lay down, anywhere within said corporate limits, all pipes, fixtures or other thing properly required in order to exercise any or all of the powers above mentioned: *provided* that this be done

[1] 1 Morawetz, Corp., §§ 320-21. 2 Beach, Priv. Corp., Sec. 385.
[2] 107 U. S. 98.
[3] 101 U. S. 71.
[4] 151 U. S. 301.
[5] *Supra*, pp. 5–7.

with as much dispatch and as little inconvenience to the public as possible: and

(4) To exercise all other powers necessary to execute and carry out the powers and privileges above mentioned.

It must be conceded that these provisions of the charter are to be reasonably construed, in accordance with the ordinary meaning of the words used, and in view of the purposes for which relator was incorporated.

The first grant of corporate power shows that the general purpose of the relator's incorporation was to provide for lighting the City of St. Louis; that right being granted to relator without restriction as to the method or means of exercising it.

The next grant of corporate power mentions one well-known means of illumination, to wit, by means of *gas*, which relator was expressly authorized to make and vend: and in the same connection, relator was authorized to make and vend *gas lights* and *gas fixtures*,— in other words, to furnish light also to private consumers.

But that clause also expressly authorizes relator to make and vend, not only gas, gas-lights and gas-fixtures, but also "*any substance or material* that may be *now or hereafter used* as a substitute *therefor*" — *i.e.*, as a substitute for *gas*, and for *gas-light*, and for *gas-fixtures*. Nothing could be broader than the power thus conferred upon relator to select and use *whatever means of illumination, and whatever method of applying it, might best accomplish the object of its incorporation as a lighting company*. The right to make and vend for that purpose any substance or material which might then or thereafter be used as a substitute for either gas, gas-light or gas-fixtures, includes, under the rule above mentioned, the right to use any such substance or material in any form or combination and by or in connection with any process suitable for that end.

But to light a city, the means of illumination must be furnished at innumerable points where the light is wanted. A question might arise whether relator's charter provided for this, or left the relator to obtain permission from the city to use the streets for that purpose. To prevent any doubt on this point, a further express grant of power is made, in the same sentence, as follows:—

"*And to that end*, may establish and lay down within any portion of said corporate limits, *all pipes, fixtures or other thing properly required to do the same* (the same to be done with as much dispatch and as little inconvenience to the public as possible)."

To what end? Obviously, to the end that the company may, without let or hindrance from the city or any officer thereof, exercise the privileges so granted to it; any interference with which, by any person *or body corporate*, subjects the offender, under Section 7 of said charter, to a heavy fine. It is also obvious that relator's right, "to that end, to establish and lay down all pipes, fixtures *or other thing* properly required to do the same," applies equally to any substitute for gas, for using which pipes and fixtures such as used to convey ordinary illuminating gas might not be suitable. Finally, as though to make absolutely certain the sufficiency and completeness of the powers so granted, the charter expressly confers upon relator —

—— "*all other powers* necessary to execute and carry out the privileges and powers hereby granted to said company."

No language more broad or effective than this could have been used to authorize relator to employ any means which then were or might thereafter become known and available for the purpose (1) of lighting the City of St. Louis, and (2) of furnishing light to private consumers, with the

right (3) *to that end*, to lay down in the streets of the city all pipes, fixtures *or other thing* properly required therefor.

But the respondents claim that relator is not empowered to make or vend electricity for lighting purposes, because, it is said, electricity is neither a "substance" nor a "material." If it be either, within the meaning of the charter, the objection fails.

The disjunctive "or", in the phrase — "any substance *or* material that may be now or hereafter", &c., — shows that the two words are used in different senses, and that the legislature intended to make the grant in the broadest possible terms.

1. Relator contends that electricity is a substance, within the meaning of the charter. The words of the charter must be reasonably construed in their ordinary sense, with reference to the purposes of the incorporation. The purpose for which these powers are granted is the production of artificial light, to be furnished and sold to the city and its inhabitants, for their benefit and for the profit of the company. The power granted is that of "making and vending * * * any substance or material that may be now or hereafter used as a substitute" for gas, *gaslights* and gasfixtures,— that is, for producing artificial light. If it is practicable to make and vend what is called electricity, and thereby to produce and furnish light which shall serve the purpose of light produced from gas, then electricity, whatever it is, is a substitute for gas, and the electric light a substitute for gas light. The charter itself furnishes the true test of its own meaning, namely,— whether electricity is something which can be *made* and *vended*, and *used as a substitute for gas*, for the production of artificial light. If it can, it is clearly within the purpose of the incorporation. However interesting to scientists may be the question — what is electricity? — it is simply irrelevant for the purpose of construing this charter.

Relator was incorporated for the production and sale of artificial light. Whatever can be *made* and *vended* so as to serve that purpose, relator is authorized to *make* and *vend*. No other construction of the charter is reasonable.

That electricity, whatever it may be, is something which can be *made* and *vended* and *used as a substitute for gas*, is not only a matter of common knowledge, of which the Court will take judicial notice, but is a fact expressly recognized by the general corporation law of Missouri, as amended in 1889 and now in force, which provides [1] —

"Sec. 2793. *Gas, electricity and water companies, powers of.*— Any corporation formed under the provisions of this article for the purpose of supplying any town, city or village with gas, *electricity* or water, shall have *full power to manufacture and sell*, and to furnish *such quantities of gas, electricity or water* as may be required in the city, town or village, district or neighborhood where located, for public or private buildings, or for other purposes; and such corporations shall have the power to lay *conductors for conveying gas, electricity or water through the streets*, lanes, alleys and squares of any city, town or village, with the consent of the municipal authorities thereof, and under such reasonable regulations as said authorities may prescribe.

"Sec. 2794. *Authority of municipality to contract, etc.*— The municipal authorities of any city, town or village are hereby authorized to contract with any such corporation *for the lighting by gas, electricity or supplying with water* the streets, lanes, alleys, squares and public places in any such city, town or village."

It will not do to say that the Missouri Legislature of 1889 knew more about electricity than the Legislature of 1857. Its use, as a substitute for gas, was generally known, in 1857, to be simply a question of time. Sir Humphrey Davy had shown in 1801, more than fifty years

[1] 1 Rev. Stat. Mo. 1889, p. 711.

previously, that electricity could be used to produce artificial light. In 1813, in a series of brilliant experiments before the Royal Institution in London, he produced a continuous electric light, between two carbons ten centimetres, or four inches, apart. In 1846, when the opera *Le Prophete* was produced in Paris, electric light was used on the stage to represent the sun, — which is said to have been the first really practical application of the electric light. In November, 1848, W. E. Staite publicly lighted by electricity the large hall of a hotel in Sunderland, England, which was described with enthusiasm by the London *Times;* and his apparatus was used in 1852, for lighting the Liverpool docks. In June, 1855, the *Quai des Celestins* at Lyons, France, was lighted by electricity ; the whole quay, according to contemporary accounts, being "flooded with refulgent rays by which one could read at a distance of 450 metres, or a quarter of a mile, from the light, and the very birds, believing day had come, quitted their nests under the eaves to fly about in the rays of the new sun." In July of the same year, the *Gazette de France* published a glowing account of the illumination by electricity of the Chateau Beaujon, at Paris ; and in October, 1856, an electric illumination was successfully carried out from the summit of the Arc de Triomphe de l'Etoile, by means of which the Avenue des Champs Elysees was illuminated for four hours.[1] Thus, before 1857, as averred by relator, and admitted by respondent's demurrer, the art of lighting not only buildings, but great public spaces, by electricity, was in practical use, though much remained to be done before it reached the stage of commercial success. There can be no reasonable doubt that these exhibitions of a new method of

[1] "The Electric Light, etc., its History," etc., by E. Alglave and J. Boulard (Sloane's translation: D. Appleton & Co., N. York, 1884), pp. 21–24.

illumination, so important, so successful and of such world-wide notoriety, were brought to the attention of the Missouri General Assembly of 1857 by the officers of the Laclede Gas Light Company when they applied for an enlargement of its charter privileges. But however that may be, the "right and privilege" then granted, "of making and vending * * * any substance or material that *may be now or hereafter* used as a substitute" for "gas, *gas lights* and gas fixtures," was broad enough and was intended, beyond any doubt or question, to include any and every improvement in the art of illumination, whether then known or not, whenever it should become available for use.

But the question whether light produced by electricity can be manufactured and sold and used as a substitute for gas light, has also been judicially determined by American courts of the highest authority, in construing important public statutes.

In *People ex rel. Brush Electric Illuminating Co.* v. *Wemple*,[1] the question was presented whether an electric lighting company was included within a general statutory exemption of *manufacturing corporations* from taxation. The defendant, as State Comptroller, undertook to enforce against the relator, an electric lighting company, certain statutory penalties for not making reports and paying taxes from which "manufacturing corporations" were exempt. The Supreme Court, on *certiorari*, held[2] that the relator was not a manufacturing corporation, and was not exempted; but this judgment was reversed by the New York Court of Appeals,[3] on the ground that a corporation whose business it was to produce and sell electricity for

[1] 129 N. Y. 543, (38 Am. & E. Corp. Cas. 657.)
[2] 15 N. Y. S. 711: 61 Hun, 53.
[3] 129 N. Y. 543.

lighting purposes was a manufacturing corporation. Said the Court: —

"According to the common understanding, the electricity, or thing which produces the results from which the corporation derives its income, is generated or produced by the application of power to machinery, and thus by means of a process wholly artificial, the relator is enabled to sell the product of its operations to its customers.

"Passing by the refinements of scientific discussion as to the nature of electricity, it would seem to be common sense to hold that a corporation that does all this is in every just sense of the term a manufacturing corporation. The mere appropriation or use of an article or thing which is furnished by nature is not a manufacturing operation. The liberation of natural gas from its hiding place in the earth, and its transportation through pipes to consumers, would not properly be called a manufacturing operation; but the production of illuminating gas, and its distribution to customers by means similar to the operation which the relator carries on, has been held by this court to constitute manufacturing, and a corporation organized for that purpose is a manufacturing corporation. * * * When we attempt to establish the proposition that the gas which lights one room is a manufactured product, and the electricity which lights another is not, we are obliged to rely more upon the definition of terms and the distinctions of scientists than the actual practical processes and operations by means of which results in all respects, or at least substantially, the same are produced. If due weight is given to the fact that electricity, as now used and applied to the business of life, such as the lighting of streets and buildings, the propulsion of cars and machinery, and like operations, is essentially the product of the skill and labor of man, there is no difficulty in reaching the conclusion that a corporation engaged in the business of generating, storing, transmitting and selling it is what was commonly known at the time of the passage of the corporation tax law in 1880, a 'manufacturing corporation.' * * * The electricity which is generated and transmitted by the operation of the relator, and which, under its manipulation, illuminates

houses and streets, is a very different thing from that mysterious element that is said to pervade nature."

The court also quotes the following from the testimony given by an expert before the Comptroller: —

"The electrical energy which is manufactured and sold by electric lighting corporations originally resides in and is extracted from the coal which is burned, or, more correctly speaking, from the heat which is produced by the combustion of coal. Electrical energy is produced at the central station. It may be stored up in cells of definite capacity, known as 'accumulators.' It may be, and in fact is, measured, and sold in determinate quantities at a fixed price, precisely as are coal, kerosene oil, and gas. It may be conveyed to the premises of the consumer upon a wagon, boxed up in an accumulator; or it may be sent through a wire, just as gas or oil may be transported either in a close tank or forced through a pipe. Having reached the premises of the consumer, it may be used in any way he may desire, being, like illuminating gas, capable of being transformed either into heat, light or power, at the option of the purchaser."

In *Commonwealth* v. *Northern Electric Light & Power Co.*,[1] a like exemption from taxation was claimed by an electric light company under a similar statute. The claim was disallowed in that case, because it was held that the words "manufacturing companies" used in that statute included only certain definite classes of corporations, specially mentioned in a series of Acts previously passed, — *e. g.*, corporations engaged in manufacturing woolen, cotton, flax or silk goods, iron, paper, lumber, salt, glass, etc., — among which electric-lighting corporations were not named. But the following passage from the opinion in that case was quoted by the New York

[1] 145 Pa. St. 105: *s. c.* 38 *s. c.* Am. & Eng. Corp. Cas., 651.

Court of Appeals in the case above cited, and is very pertinent here:

"This company whose charter we are considering, sells the electricity it makes, or 'brings into being,' as a commodity. It provides the lamps or appliances for the use of its customers by means of which the light is produced. It sells them the electricity, measures it as it is delivered, and is paid according to the quantity furnished. Whatever electricity may be, it seems absolutely within the power and under the control of the company that brings it into being. It is compelled, by the process employed, to come into being. It is secured, stored, poured out, or liberated at will. Its manifestations are both seen and felt. It moves with incredible velocity and power. It carries the tones and inflections of the human voice, or moves loaded cars, depending on the volume of the current and the manner of its application. It may be in the hands of a physician a soothing, remedial agent, and in the hands of the law an instrument of execution swifter and surer than the headsman's axe. It may be too early to show just what it is. *The scientists, whose views the learned judge adopted, may be right or wrong We have no need to decide that question. The laws are written, ordinarily, in the language of the people, and not in that of science;* and if this case depended on the question on which it turned in the court below, we should be led by the findings of fact to a different conclusion from that which was there reached, and hold that this company was *a manufacturing company.*"

2. But independently of all this, respondents' objection is conclusively answered if it appear that relator, in making and furnishing what is called *electric light*, as a substitute for *gas light*, is simply using some other *material* as a substitute for gas. The express averments in relator's reply,[1] the truth of which respondents' demurrer admits, show that such is the fact.

[1] *Supra*, pp. 18-20.

Under the rule laid down by the Supreme Court of Missouri in *Henning* v. *U. S. Insurance Co.*,[1] relator is empowered, in fulfilling the purposes of its incorporation, "to adopt all reasonable modes in the execution of its business which natural persons may adopt in the exercise of similar powers."

The mode by which, in familiar phrase, relator proposes "to use electricity for making light," is thus averred in its reply:[2] —

That for the purpose of lighting a city, or to illuminate any space therein, whether a public street or alley, or a building or any portion thereof, it is necessary to produce artificial light in the space to be illuminated; that artificial light is produced by making incandescent, that is to say, by bringing to a condition of white heat, in which it gives out light, any substance or material capable of being so used: that in order to light said city as aforesaid, relator was expressly authorized by its charter to make and vend not only illuminating gas, but any substance or material which might then or thereafter be used as a substitute therefor, and to that end to establish and lay down at any point within the corporate limits of said city all pipes, fixtures or other thing properly required to do the same: that illuminating gas is a highly inflammable compound of carbon and hydrogen, chemically combined in certain fixed proportions: that in order to use said gas for illuminating purposes, it must be set on fire, which decomposes said gas, setting free the carbon therein, in the form of fine particles, and rendering said carbon particles incandescent, which produces what is called gas light.

That light may also be produced from carbon, by means of electricity, to wit, by using carbon, not compounded with any other element, in the form of rods or filaments, which may be and are brought to a condition of incandescence by transmitting into or through said carbon rods or filaments what is called electricity, by means of apparatus suitable therefor; the result being that the carbon thus

[1] 47 Mo. 432: *supra*, p. 93.

[2] *Supra*, pp. 18-20.

rendered incandescent gives out what is called electric light, which has greater illuminating power than gas light and is commonly used as a substitute therefor, as well for the illumination of public streets and places as of public and private buildings in many cities throughout the United States.

That the right and privilege of lighting the city of St. Louis as aforesaid granted by its charter to relator, includes the production of light in the manner last above described, to wit, by making carbon or any other suitable substance incandescent by means of electricity, equally with the right or privilege of making and using carbon in its compound form of illuminating gas, and by making it incandescent in the manner above stated, to wit, by the application of heat; carbon being in either case the substance or material which is made incandescent, thereby producing light, though when illuminating gas is used, the carbon is in a compound form, the particles thereof being set free and made incandescent by heat as above stated, producing what is called gas light, while in the production of electric light pure carbon is used as a substitute for gas, and is made incandescent by the application of electricity.

It is true, as in said return alleged, that relator, therein exercising its corporate franchise of lighting the city of St. Louis, and of vending gas and gas light, has heretofore established, placed and laid down certain pipes and fixtures beneath the surface of the street on the east side of Broadway from Mound Street to Olive Street, and at divers and sundry other places beneath the surface of the streets of said city of St. Louis, for supplying gas to its consumers; and by means thereof relator has during more than ten years last past carried on, and still carries on, its business as a lighting company, of all which said city and the municipal authorities thereof had notice and have at all times acquiesced therein.

It is also true that in order to produce or furnish light by means of electricity, it is necessary to use wires for conducting the same, and to support said wires either on poles above the surface of the streets, as relator is now doing under a contract with said city of St. Louis, or in tubes or conduits beneath said surface. Relator states

that its purpose in making the excavation on Broadway, mentioned in said petition, was to construct and place underground a conduit for wires, such conduit and wires being properly required for the production of electric light as a substitute for gas light; that the conduit and wires intended by relator to be so laid down are of the most approved description, such as are used for like purposes in other cities, said conduits occupying when completed a space not exceeding thirty inches in width under the surface of the street, with provision for access thereto at suitable intervals through manholes properly covered and protected, less than forty inches in width at the surface of the street: the said conduits and manholes when completed and in use, offering no obstruction whatever to the use of the streets for travel and traffic, and the danger to life and property which attends the use of overhead electric wires, such as relator is now using under contract with said city of St. Louis for the purpose of lighting public streets and alleys therein, being entirely avoided by placing said wires in said conduits.

Even if the truth of these averments were not admitted on the record, the facts averred concerning the mode of producing light by gas and by electricity respectively are matters of common knowledge, of which this Court will take judicial notice. In *Brown* v. *Piper*,[1] approvingly cited by the Supreme Court of Missouri in *State* v. *Hayes*,[2] this Court said:—

"Courts will take notice of whatever is generally known within the limits of their jurisdiction; and, if the judge's memory is at fault, he may refresh it by resorting to any means for that purpose which he may deem safe and proper. This extends to such matters of science as are involved in the cases brought before him. See 1 Greenl. Ev., 11; Gres. Eq. Ev., 294; and Taylor Ev., Sec. 4 and *post*."

[1] 91 U. S. 37.

[2] 78 Mo. 318.

In that case, this Court took judicial notice, not only of the effect of cold in preserving animal and vegetable substances, but of a particular method of constructing apparatus for artificial freezing, described in 7 American Encyclopædia, 474.

In *Wolfe* v. *Mo. Pacific R'y Co.*,[1] it was held that the nature, operation and ordinary uses of the telephone are facts of general scientific knowledge of which the courts will take judicial notice as part of public cotemporary history.

In *Udderzook* v. *Commonwealth*,[2] the defendant being charged with the murder of G, a photograph of G, proven to resemble a mutilated body found, was admitted in evidence, on the ground that judicial notice would be taken that photography was a means of producing correct likenesses.

In *Luke* v. *Calhoun County*,[3] the Court said, concerning photography:—

"It has been so long recognized, the mechanical and chemical processes employed and the scientific principles on which it is based, are so generally known, that it would be vain for a court to decline cognizance of it."

In view of the averments above set forth, the case stands thus. Relator's charter empowers it to make and vend *gas light*, or any substance or material used as a substitute therefor. Relator claims the right to make and vend *electric light*, or light produced by means of electricity, as such a substitute. Respondents deny this, because, it is said *electricity* is not a substance or material. But it is admitted of record, and the Court will take judicial notice also, that electric light, so called, is a perfect substitute for and an improvement upon gas light; that it is practicable,

[1] 97 Mo. 481-2. [2] 76 Pa. St. 340. [3] 52 Alabama, 119.

and relator intends, to make electric light, and vend it as a substitute for gas light, by using pure carbon, in the form of rods and filaments, being the identical *material* used (in its compound form of gas), for the production of gas light; the difference being that to produce *gas light*, the carbon is set free and made incandescent by the application of *heat*, whatever that may be, while, for the production of *electric light* the pure carbon, in the form of rods or filaments, is made incandescent by the application of *electricity*, whatever that may be. But relator's charter does not require or confine it to the use of heat to produce incandescence. Being empowered to use, for the production of light, any substance or material which can be used therefor, it is empowered to use any such material in any way, by any process, and under any conditions, "properly required therefor" and not otherwise unlawful, which will enable it to fulfill the purpose of its incorporation. It has therefore corporate power to make and vend electric light, produced in the manner averred and admitted in the pleadings.

VII.

Assuming the validity, duration and proper construction of relator's charter to be as above contended for, the enforcement by the City of St. Louis of the city ordinance mentioned in the pleadings,[1] *by denying to relator permission to lay its wires underground unless it shall comply with the conditions prescribed in said ordinance, is the denial of a right held by relator in virtue of said charter, and impairs the obligation of the contract contained therein. The judgment of the court below, upholding said ordinance as valid against relator, was therefore erroneous and should be reversed.*

[1] *Supra*, pp. 21–23.

The court below assumed, without deciding, "that relator is an existing corporation, possessing all the powers, rights and privileges its charter purports to confer upon it," including the right to use electricity for making light; and confined its inquiry to the question — "whether relator has a vested right to place its wires under the surface of the streets without the assent of the municipal authorities thereof and without compliance with valid ordinances of the city?" [1]

The only city ordinance whose existence is disclosed by this record, or of which this Court can take notice, is the ordinance mentioned in respondent's return; [2] the provisions of which (as re-enacted in 1892) are set out in full in relator's reply [3] and averred to be the only provisions of any existing ordinance of said city purporting to prescribe any regulations or conditions in respect of placing electric wires along, across or under any of the streets thereof; the truth of which averment is admitted by respondents' demurrer. It follows, upon the assumption above stated, that the case of these respondents, upon this record, depends absolutely upon the validity, as against relator, of the particular ordinance now before this court. Except as presented by the provisions of *that ordinance*, no question arises or can arise in this cause as to the extent either of the city's power to regulate the use of streets, or of its police power. Whatever its powers may be in that regard, the city has undertaken to exercise them by enacting and enforcing *that ordinance* and in no other way. If, in so doing, the city has exceeded its powers, that ordinance is void, as against relator, and the judgment below, which depends solely upon its validity, was erroneous and should be reversed.

[1] *Supra*, pp. 30-31.
[2] *Supra*, pp. 13-14: Pr. Rec., p. 27.
[3] *Supra*, pp. 21-23: Pr. Rec., pp. 51-55.

As above shown,[1] the corporate powers granted by the State to relator included not only the right (1) of lighting said city, and (2) of making and vending gas, gaslights and gasfixtures and any substance or material that might then or thereafter be used as a substitute therefor, but also the right,—

— *to that end*, to establish and lay down within the corporate limits of said city as then or thereafter established "all pipes, fixtures or other thing properly required therefor (the same to be done with as much dispatch and as little inconvenience to the public as possible)."

Relator's corporate power and right, under this grant, to lay and use *gas pipes* in the streets of said city is not denied. On the contrary, respondents aver that relator has exercised that right at divers places beneath the surface of the city streets for the purpose of vending and supplying gas to the consumers in said city.[2] But if relator has also the right to use electricity in making light,— that is, to make and vend electric light as well as gas light,— then it is equally authorized, "*to that end* to establish and lay down within said corporate limits *all pipes, fixtures or other thing properly required in order to do the same*" — upon the like condition — "the same to be done with as much dispatch and as little inconvenience to the public as possible." But respondents' return expressly avers[3] "that in order to convey electricity it is necessary to carry the same by means of wires strung on poles above the surface of the streets, or by means of wires strung in non-conductive tubes or conduits beneath the surface of the streets." It is thus admitted that an underground conduit such as relator

[1] *Supra*, p. 94, under VI.
[2] *Supra*, p. 13: Pr. Rec., p. 27.
[3] *Supra*, p. 13: Pr. Rec., p. 27.

desires to construct on Fifth Street is a "thing properly required" for making and vending electric light.

In other words, assuming that the State granted to relator the corporate powers above contended for (and assumed by the court below), such grant unquestionably included the right to lay electric wires under the streets, in conduits such as described in relator's reply.

But such a right is a corporate franchise, and such a grant is a contract by the State. In *New Orleans Gas Light Co.* v. *Louisiana Light Co.*,[1] this Court held that the right to use the streets of a city for laying gas pipes was a franchise or privilege the exercise of which can only be granted by the State or the municipality acting under legislative authority; citing to like effect the decisions of other courts, and Judge Dillon's work on municipal corporations.[2]

It further held that such a grant by the State is:—

—"none the less a contract, because the manufacture and distribution of gas, when not subjected to proper supervision, may possibly work injury to the public; for the grant of exclusive privileges to the plaintiff does not restrict the power of the State or of the municipal government of New Orleans acting under authority for that purpose, to establish and enforce regulations *which are not inconsistent with the essential rights granted by plaintiff's charter*, which may be necessary for the protection of the public against injury," etc.

The just limits of the police power, in respect to corporate franchises, thus indicated by this Court, were emphatically recognized by the Supreme Court of Missouri in *State ex rel.* v. *Greer*,[3] affirming *Sloan* v. *Mo. Pacific R.*

[1] 115 U. S. 650.

[2] State *v.* Cincinnati Co. Co., 18 Ohio St. 262; Boston *v.* Richardson, 13 Allen, 146; 2 Dillon Mun. Corp. (4th ed.), Sec. 691.

[3] 78 Mo. 195.

R. Co.,[1] and citing Judge Cooley's remarks on that subject.[2]

Such being the nature of the grant, to what extent does this ordinance undertake to restrict the franchise granted?

An inspection of its provisions[3] shows that it begins (Sec. 603) by absolutely prohibiting the placing of electric wires, tubes or cables along or across any street, etc., in St. Louis by any corporation which (not having previously accepted and complied with city ordinance No. 12,723, amended and replaced by this ordinance), shall not be "duly authorized by the Municipal Assembly, and then only as hereinafter provided." Section 612 provides that no corporation shall be entitled to any of the privileges conferred by this article except upon the conditions therein stated; and by Section 613 any corporation or any officer thereof, violating or failing to comply with the provisions of said article is declared guilty of a misdemeanor punishable by fine not exceeding $500.

It is admitted that relator never accepted or complied with city ordinance No. 12,723. It follows, if the ordinance here relied on be valid, that if the Laclede Gas Light Company, or any officer thereof, should attempt to exercise the franchise granted to said corporation by the State, *without first obtaining authority therefor from the Municipal Assembly of St. Louis*, without reference to the further conditions imposed by Section 612, said company or such officer would be liable to the penalty above stated. No conditions are prescribed, by fulfilling which such authority can be obtained. Whether, in respect of any particular corporation, it will be granted or denied by the Municipal Assembly, rests absolutely in the discretion

[1] 61 Mo. 31-2.

[2] Cooley's Const. Lim. (5th ed.), p. 712.

[3] *Supra*, pp. 21-23; Pr. Rec., pp. 52-55.

of that body; but if granted, such corporation must still fulfil the conditions prescribed in Section 612.

This is not regulating the exercise of a corporate franchise, but denying it altogether except at the mere will of the municipality; which thus assumes the power, if it choose, to repeal the grant and violate the contract made by the State. And the ordinance is so drawn, that to enforce it at all, this assumed right of the municipality must be insisted on, for it is a condition precedent to all that follows.

Said ordinance then provides (Section 604) that all such wires, etc., along or across any street, etc., "shall be placed at such distances above or below the surface of the ground, and secured in such manner *as shall be prescribed by the Board of Public Improvements;*" and further (Section 605) that any corporation *duly authorized by ordinance to do business in the City of St. Louis* and desiring to place such wires, etc., shall file in the office of the Board of Public Improvements an application and plat showing the route thereof and the manner of supporting, etc., the same; and (Section 606) that upon these being filed, the Board of Public Improvements is authorized to grant a permit for such occupancy of the streets, etc., "*with such restrictions, regulations and qualifications as may be prescribed by said board*, and under the supervision and to the satisfaction of the Supervisor of City Lighting."

Sections 607 to 611 relate exclusively to overhead wires, to be strung on poles, and are irrelevant here.

Section 612 contains the further conditions above referred to, presently noticed.

These sections, it will be observed, prescribe no regulations whatever as to the manner in which *underground* electric wires shall be laid, supported or secured. The only regulations provided for are those which the Board of Public

Improvements is *authorized* — not required — to prescribe for the government of any such corporation, when it shall have filed in the office of the Board of Public Improvements an application and plat such as required. But said Board is not authorized to grant any such permit or prescribe any such regulations, in respect of any corporation which has not previously been authorized by ordinance to do business in the city. It thus appears (if said ordinance be valid), that relator's right to exercise its corporate franchise in question, absolutely depends, not only upon the consent of the Municipal Assembly, but upon the consent of the Board of Public Improvements, and upon its compliance with regulations to be prescribed, not by ordinance, but by the Board of Public Improvements, and to be fulfilled to the satisfaction of the Supervisor of City Lighting.

But this is not all. If this ordinance is valid, relator must still (Sec. 612)[1] "before availing itself of any of the rights or privileges granted by this article,"—

(1) File with the City Register *an acceptance of all its terms*,— thereby acknowledging the unqualified right of the city to permit or prohibit the exercise of its charter right — and must agree therein

(2) To file with the City Comptroller semi-annually sworn statements of its gross receipts: and

To pay to the City Treasurer, an annual tax of *five per cent of its gross receipts:*

(3) Also file with the City Register its bond in $20,000 with two sureties to be approved by the Mayor and Council, conditioned

To comply with all the conditions of this ordinance or *any ordinance which may hereafter be passed* regulating the placing of underground wires, etc., and

To comply *with all regulations made by the*

[1] *Supra*, p. 22.

Board of Public Improvements in reference to the subject of said article, and

To make the statements and payments required as above, and to indemnify the City of St. Louis from all cost, damage, etc., by reason of the exercise of any of the privileges granted by said article *or any ordinance which may hereafter be passed* relating to the subject-matter thereof.

And by Section 613, for any failure to comply with any provision of said article, not only relator, as a corporation, but its President, Manager, Superintendent or other officer, is declared guilty of a misdemeanor and liable to a fine not to exceed $500.

It is clear that this ordinance must stand or fall as a whole. If it be valid, relator is absolutely prohibited from exercising the franchise, claimed under its charter, to make and vend electric light, as a substitute for gas light, and "*to that end* to lay down all pipes, fixtures or other thing properly required therefor," unless it shall *first* obtain authority to do so from the Municipal Assembly, and *second*, obtain a permit from the Board of Public Improvements in the manner required, and *third*, comply with all the regulations which said Board may now or at any time hereafter prescribe, to the satisfaction of said Board and of the Supervisor of City Lighting, and *fourth*, file with the City Register (1) its acceptance and agreement and (2) its bond in $20,000, such as prescribed in Section 612, — each and all of which conditions must be fulfilled by relator "before availing itself of any of the rights and privileges granted by this article."

It is equally clear, if we assume (as assumed by the court below)[1] that relator is "an existing corporation, possessing all the powers, rights and privileges its charter

[1] *Supra*, p. 30: Pr. Rec., p. 41.

purports to confer upon it," that the question of the affirmance by this Court of the judgment below, turns exclusively upon *the validity of this ordinance*, as against relator. It is averred, and admitted by respondents' demurrer, that no other ordinance of said city purports to prescribe any regulation or condition in respect of the laying of underground electric wires;[1] also[2] that the refusal of respondent Murphy, Street Commissioner, to permit plaintiff to excavate in any street of said city for any purpose, or to issue a permit therefor, was not upon the alleged ground, nor in fact for the reason, that by laying its wires underground in the manner by it proposed relator would cause any inconvenience to the public, but was an unconditional refusal; and such refusal is justified by the return of both respondents upon the sole ground, so far as the city is concerned,[3] that *said ordinance is valid*, and that the relator had never accepted nor complied with its conditions, "*nor has it ever been authorized by the Municipal Assembly of St. Louis to place its wires, tubes or cables under the streets or alleys of St. Louis.*" Upon this defense alone the court below based its judgment, saying:[4]—

As the case is now presented we must hold that the city, under its power to regulate the use of streets, and under its general police power, has the right to require a compliance with regulations which either *wholly prohibit relator from laying its wires under the streets* or which regulate the manner in which it may be done. Respondent under his official duties as Street Commissioner, properly refused to grant the permit demanded unless relator first complied with the requirements of the valid ordinances then in force.

[1] *Supra*, p. 21: Pr. Rec., p. 51.
[2] *Supra*, pp. 10, 24: Pr. Rec., pp. 9, 22, 56.
[3] *Supra*, pp. 13–14: Pr. Rec., p. 28.
[4] *Supra*, p. 35: Pr. Rec., p. 44.

It only remains, therefore, to consider whether *this ordinance* is valid, as against relator's charter rights. And for the purpose of that inquiry, the only question prescribed by this record is, we submit:—

Whether the City of St. Louis, either under its charter power to regulate the use of streets, or under its general police power, can prohibit and prevent relator from exercising the corporate franchise in question, unless it shall first comply with *the conditions prescribed in that ordinance*, without impairing the obligation of the contract contained in relator's charter?

Whatever its charter powers may be in that regard, the City of St. Louis has undertaken by that ordinance alone to exercise them: and if, as against relator's charter rights, it has exceeded those powers, that ordinance cannot lawfully be enforced, and the judgment of the court below should be reversed.

VIII.

*The Charter of St. Louis (Article III, Section 26, Paragraph 2), empowers the Mayor and Assembly, "by ordinance not inconsistent with the constitution or any law of this State or its charter * * * to construct and keep in repair all bridges, streets, sewers and drains and to regulate the use thereof." This power must be exercised by ordinance. The ordinance in question does not contain, but authorizes the Board of Public Improvements to prescribe, regulations as to the placing and securing of underground wires. Even if the city had power, under its charter, to regulate or control the exercise of relator's charter rights, it can not delegate that power to the Board of Public Improvements. Said ordinance, so far as it relates to underground wires, is void.*

The first condition prescribed by said ordinance is that relator shall have been authorized by the Municipal Assembly to lay its wires underground. The next is that it shall obtain a permit from the Board of Public Improvements, in the manner prescribed, "with such restrictions, regulations and qualifications as may be prescribed by said Board." The ordinance itself prescribes no regulations as to the manner of laying underground wires.

The validity of the first condition will be considered presently. The second is justified as an exercise of the city's charter power "to regulate the use of streets." But that power, by the charter of St. Louis,[1] is intrusted only to the Mayor and Assembly, to be exercised by ordinance. This ordinance contains no regulations as to the manner of laying wires underground. By it, the Mayor and Assembly have not exercised that power, but have attempted to delegate it to the Board of Public Improvements. To that extent, without reference to relator's charter rights, the ordinance is void.

"The principle is a plain one" (says Judge Dillon)[2] "that the public powers or trusts devolved by law or charter upon the council or governing body to be exercised by it when and in such manner as it shall judge best, *cannot be delegated to others.*"

This doctrine has been affirmed by the Supreme Court of Missouri in many cases. In *Ruggles* v. *Collier* (1869),[3] that court said:—

"There is a clear distinction to be observed between legislative and ministerial powers. The former cannot be delegated; the latter may. Legislative power implies

[1] Art. III, Sec. 26, Par. 2: 2 Rev. Stat. Mo. 1889, p. 2096.
[2] 1 Dillon Mun. Corp. (4th ed.), p. 154, Sec. 96.
[3] 43 Mo. 353.

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judgment and discretion upon the part of those who exercise it, and a special confidence and trust upon the part of those who confer it."

In that case, the St. Louis charter empowered the city council, whenever they should deem it necessary, or upon the petition of a majority of abutting owners, to cause the repaving of any street or portion thereof. An ordinance empowering the Mayor to repave the streets in a designated district with wooden pavements "wherever and whenever he shall deem it necessary," was held void as an unlawful delegation of power.

On the same ground city ordinances were held void in the following cases:—

St. Louis v. *Clemens*,[1] because the dimensions of a sewer were left to the city engineer, when the charter required sewers "to be of such dimensions as prescribed by ordinance." Said the court:—

"The rule is well settled that corporations are the mere creatures of the law, established for special purposes and deriving all their powers from the Acts creating them. The corporate acts must not only be authorized by the charter, but these acts must be done by such officers or agents and in such manner as the charter directs (citing numerous cases). The ordinance conferring the authority on the engineer was not in legal conformity with the charter, and must be disregarded."

Thompson v. *Boonville*;[2] City council cannot delegate to a committee its power to fix the grade of a street.

Matthews v. *Alexandria*;[3] nor to the Mayor power to fix wharfage rates.

St. Louis v. *Russell*;[4] nor make the erection of a livery

[1] 43 Mo. 395.
[2] 61 Mo. 282.
[3] 68 Mo. 115, 119.
[4] 116 Mo. 248, 255-7.

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stable dependent upon the consent of neighboring owners (citing *Ruggles* v. *Collier* and many other cases).

City of Nevada v. *Eddy*;[1] power of city council to improve street by *ordinance* cannot be exercised by *resolution*.

So, in *Birdsall* v. *Clark*,[2] affirming *Thompson* v. *Schermerhorn*,[3] the charter of Binghampton authorizing the common council, by contract or otherwise, to cause sidewalks to be built, that body passed a resolution directing the superintendent of streets, when the owner failed to do such work within the time limited, "to cause the same to be done;" which, on like grounds, was held void.

It is too plain for argument, under these decisions, that the framing of proper regulations as to the manner of laying underground electric wires, such as contemplated by the ordinance in question, is not a merely ministerial duty, but would require the exercise of legislative discretion. It cannot, therefore, be delegated by the Mayor and Municipal Assembly of St. Louis to the Board of Public Improvements. On that ground, aside from any other objection, the ordinance in question is void.

It does not appear from this record that any regulation as to the laying of underground wires was prepared, or prescribed to relator, even by the Board of Public Improvements; nor that said board could reasonably have required relator to lay or secure its wires in any other manner than that proposed by it. That method is not only described, but is averred,[4] and admitted by respondents' demurrer, to be practicable, of the most approved description, such as used for like purposes in other cities, offering no obstruction whatever to the use of the streets for travel

[1] 123 Mo. 546, 557-9.
[2] 73 N. Y. 73, 76-7.
[3] 6 N. Y. 92.
[4] *Supra*, pp. 9, 20: Pr. Rec., pp. 21, 50-1.

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or traffic, and avoiding entirely the danger to life and property which attends the use of overhead electric wires such as relator is now using under contract with said city.

Upon the facts presented by this record, therefore, not only has relator fulfilled the sole condition annexed by the State to its corporate franchise, but no reasons exists, so far as relator is concerned, for any exercise by the city of any charter power or police power in this regard. Whether exercised by the State, or by a municipality, those powers exist solely for the protection of the community, and to prevent the wrongful or injurious use by any member of the community of any property or right which he may possess. When no wrong is threatened, when every duty is fulfilled, and every safeguard is provided, no further regulation is required.

IX: X.

Said ordinance is void, as against relator, because, under color of the charter power of the city, by ordinance, to regulate the use of streets, it absolutely prohibits the exercise by relator of corporate franchises essential to the conduct of its business and expressly granted to that end, except with the city's consent.

For like reasons, said ordinance is not valid as a police regulation. The city cannot, under color of its police power, deprive relator of any of the essential rights and privileges which its charter confers. Such regulations to be valid, must be police regulations in fact, and not amendments of the charter, or curtailment of the corporate franchises.

As above shown, this ordinance prescribes no regulation as to the manner of laying wires underground, and the attempted delegation to the Board of Public Improvements of the power to make such regulations, is void. It is not,

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therefore, an exercise of the city's power to regulate the use of streets.

So far from regulating the use of streets, it absolutely prohibits relator from exercising its corporate franchise of carrying on the lighting business, except by permission of the Municipal Assembly, to be granted or withheld at their arbitrary will. Relator's charter, as above contended, empowers it to make and vend electric light, and "*to that end* to establish and lay down all pipes, fixtures and other thing properly required therefor." This, as above shown, is a corporate franchise, granted by the State upon the sole condition that such pipes, etc., shall be laid with as much dispatch and as little inconvenience to the public as possible. The pleadings admit that relator is ready and has offered to comply with this condition; that pipes or conduits under the streets for carrying suitable wires for that purpose are not only "a thing properly required" but necessary therefor; and that the manner in which relator proposes to construct such conduits and lay such wires therein fulfils not only the sole condition annexed by the State to its grant, but every other condition requisite to the safe and convenient use of the public streets. Yet the City of St. Louis insists that unless relator shall obtain the consent of the Municipal Assembly, and also fulfill other onerous conditions above mentioned, it shall not exercise that franchise, and to that extent shall not carry on the business for which it was incorporated by the State. But if the city can thus prevent relator from making and vending electric light, it can equally prevent it from making and vending gas light, and from laying gas pipes in the street — in short, from carrying out the essential objects of its incorporation.

Neither the charter power to regulate the use of streets, nor the general police power of the city justifies this denial to relator of a right granted to it by the State, by a

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contract not subject to alteration or repeal. To prohibit the exercise of the right, is not to regulate it.

In *St. Louis* v. *Western Union Telegraph Co.*,[1] the power of the City of St. Louis to regulate the use of its streets, under its present charter, was considered. It was held that under the charter of 1875, the city has a very enlarged control over property devoted to public uses within its limits, including the right to regulate the use of the streets. Said the Court:—

"If the city gives a right to the use of the streets or public grounds, as it did by Ordinance No. 11,604, it simply regulates the use when it prescribes the terms and conditions upon which they shall be used. * * * *Unless, therefore, the Telegraph Company has some superior right which excludes it from subjection to this control on the part of the city over the streets*, it would seem that the power to require payment of some reasonable sum for the exclusive use of a portion of the streets was within the grant of power to regulate the use. That the company gets no such right from the General Government, is shown by the opinion heretofore delivered, *nor has it any such from the State*."

To the contention of the Telegraph Company that the General Assembly had absolute power over the city streets, the Court replied:[2]—

"Counsel also refer to the case of *Atlantic & Pacific Railroad* v. *St. Louis*, 66 Missouri, 228, but there is nothing in that case which throws any light upon this. In that it appeared that there was an act of the legislature giving to the railroad company a specific right in respect to the construction of a track within the city limits, and it was held that the company was entitled to the benefit of that act, and to claim the right given by the general assembly,

[1] 148 U. S. 103 (s. c., 149 U. S. 469-471).
[2] p. 471.

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although it had after the passage of the act proceeded in the construction of the track under an ordinance of the city purporting to give it the privilege. But, as we have seen, the act of November 17, 1855, vested in defendant no general and irrevocable power to occupy the streets in any city in the State through all time. We find nothing, therefore, in the cases cited from the Missouri courts which militates with the conclusions we have drawn as to the power of the city in this respect."

But relator's charter, as above contended, does contain an express and irrevocable grant[1] from the State of the specific right and corporate franchise here in question. The condition annexed to that grant — "the same to be done with as much dispatch and as little inconvenience to the public as possible" — was an exercise by the State itself of its paramount right to "the absolute control of the streets in cities and other highways," which the Supreme Court of Missouri affirmed in the case referred to.[2] Unquestionably, relator must fulfill that condition, and its readiness to do so is admitted by the pleadings in this cause. In what manner, or by whom, if it refused to do so, that duty should be enforced, is a question which does not arise on this record. By the ordinance here in question, as above shown, the city is not regulating, but prohibiting, the use of the streets by relator for laying underground wires, except upon conditions which cannot be reconciled with the enjoyment by relator of the grant from the State. Relator cannot fulfill those conditions without virtually surrendering its franchise of occupying the streets for the purposes of its business, equally for laying gas pipes as for laying electric wires underground.

Said ordinance also requires, under color of regulating the use of the streets, the payment by relator of an annual

[1] State *ex rel.* City of St. Louis *v.* Laclede G. L. Co., 102 Mo. 484–6.
[2] Atlantic & Pacific R. R. Co. *v.* St. Louis, 66 Mo. 256.

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tax of *five per cent. on the gross receipts from its business.* This condition is void, because (1) it annexes to the enjoyment of relator's corporate franchises a condition not required by the State, and inconsistent with the grant, and (2) if regarded as compensation for the use of the streets, it is an unreasonable demand.

In the *Western Union Telegraph case*, *supra*, this Court, while holding that the city might, under the power to regulate the use of the streets, require the Telegraph Company to pay for the privilege of erecting its poles, nevertheless held [1] that "all that it can insist upon is, in this respect reasonable compensation for the space in the streets thus exclusively appropriated." On its face, a tax of five per cent. upon relator's gross receipts from its business is exorbitant and unreasonable compensation for the privilege of laying, under the surface of a public street, a conduit thirty inches wide, which, as the pleadings admit,[2] will offer no obstruction whatever to the use of the streets for travel or traffic. But any such tax is unlawful, since relator has the right, under a grant from the State, without any such condition, to so occupy the street. "The power to tax is the power to destroy." If the city can tax relator five per cent for the privilege of doing business, it can equally well tax it seventy-five per cent. If the tax is for revenue purposes, it is not a regulation of the use of the streets, nor a police regulation. If, as we insist, it diminishes to that extent the value of relator's franchises, then it impairs the obligation of the contract of the State.

In *Mayor, &c.*, v. *Second Avenue R. R. Co.*,[3] the New York Court of Appeals held void an ordinance which, under color of regulating a street railroad company, imposed an annual license tax of $50 per car. The city had previously granted to the company permission to construct and operate

[1] 148 U. S. 105. [2] *Supra*, p. 20. [3] 32 N. Y. 261.

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its railroad, but undertook subsequently to impose this tax. The court held that it was not a regulation, but "the imposition of an annual tax upon the company in derogation of its rights of property, and on that account is unlawful and void."

This ordinance, and the conditions imposed by it, cannot be upheld as police regulations. This Court, while steadfastly upholding the legitimate exercise by the States of the police power reserved to them, has uniformly insisted that no State, much less a municipality, under color of that power, can impair rights protected by the Federal Constitution.

In *New Orleans Gas Co.* v. *Louisiana Light Co.*, *supra*, this Court further said:[1] —

"Definitions of the police power must, however, be taken subject to the condition that the State cannot, in its exercise, *for any purpose whatever*, encroach upon the powers of the General Government, *or rights granted or secured by the supreme law of the land.*"

In the recent case of *Gulf, &c., R. R.* v. *Hefley*,[2] the same doctrine is affirmed, citing other cases to like effect.

In *Mugler* v. *Kansas*,[3] this Court sustained the Kansas Prohibition Law, as within the police powers of the State, holding that it belonged to the legislative department to exert those powers —

"— and to determine, primarily, what measures are appropriate or needful for the protection of the public morals, the public health or the public safety."

But the Court further said:—

"It does not at all follow that every statute enacted ostensibly for the promotion of these ends is to be accepted

[1] 115 U. S. 650, 661. [2] 158 U. S. 104-5. [3] 123 U. S. 623.

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as a legitimate exertion of the police powers of the State. There are, of necessity, limits beyond which legislation cannot rightfully go. * * * If, therefore, a statute purporting to have been enacted to protect the public health, the public morals or the public safety, has no real or substantial relation to those objects, *or is a palpable invasion of rights secured by the fundamental law*, it is the duty of the courts to so adjudge and thereby give effect to the constitution."

The same doctrine has been repeatedly affirmed by the Supreme Court of Missouri. In *State ex rel.* v. *Greer*,[1] affirming *Sloan* v. *Pacific Railroad*,[2] that court said:—

"This term, police, is a very indefinite one. Perhaps Judge Cooley's definition may be considered as exact a one as we shall find. 'Police regulations,' says the author,[3] 'must have some reference to the comfort, safety or welfare of society; they must not be in conflict with any of the provisions of the charter; *and they must not, under pretense of regulation, take away from the corporation any of the essential rights and privileges which the charter confers.* In short, they must be police regulations in fact, and not amendments of the charter, or curtailment of the corporate franchise.'"

In *State ex rel.* v. *Corrigan St. Ry. Co.*,[4] affirmed in *City of Kansas* v. *Corrigan*,[5] the city of Kansas had granted to a street railway company the right to maintain a horse railroad in various streets in that city for twenty years. By a later ordinance, it undertook to impose on the railway company, without its consent, an additional obligation to pave the street; and this was defended as an exercise of the city's police power, and its power to regu-

[1] 78 Mo. 194–5.
[2] 61 Mo. 31–2.
[3] Cooley's Const. Lim. (5th ed.), p. 712.
[4] 85 Mo. 263, 282.
[5] 86 Mo. 67, 70.

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late the use of streets. But the court held the ordinance void on the ground that the former ordinance, granting the right to build and operate the railway, which was accepted and large sums of money expended on the faith of it, was a contract by the city with the railway company, which it could not lawfully impair. Said the court :[1]—

"If any one thing is guarded in the law more particularly than another, it is the inviolability of a contract, and all attempts to impair such obligations, under whatever guise they are made, whether directly or indirectly, must prove abortive. *State ex rel.* v. *Miller*, *66 Mo. 329; *State* v. *Miller*, 50 Mo. 129; *Hovelman* v. *K. C. Horse Railroad Co.*, 79 Mo. 632."

In the case at bar, the city disregards the obligation of a contract made by the State, and whose inviolability is protected by the national constitution.

We repeat that the State itself, in granting its corporate franchises to relator, prescribed the conditions upon which they should be held and enjoyed. The State itself, having "absolute control over streets in cities," [2] undertook in this instance to regulate the use of the streets, by expressly empowering relator not only to carry on a lighting business, but "*to that end* to establish and lay down all pipes, fixtures or other thing properly required therefor, the same to be done with as much dispatch and as little inconvenience to the public as possible." It is not claimed that this condition has been or will be violated by relator. The contrary is admitted by these pleadings, and the ostensible requirement of the city ordinance in that regard is thus fulfilled. In fact, the city by that ordinance, has not really attempted to *regulate the use* of the streets. It has prescribed no regulation whatever as to the manner in which relator's

[1] 85 Mo. 282.

[2] Atlantic & Pacific R. R. Co. *v.* St. Louis, 66 Mo. 288.

wires shall be laid, or the safety or convenience of the public protected. It is simply an attempt by the city to repeal and nullify the grant by the State, and to subject relator, the conduct of its business, and the enjoyment of its franchises, to its own absolute control.

In *Citizens St. Ry. Co.* v. *Memphis*,[1] the U. S. Circuit Court enjoined the city of Memphis from obstructing the plaintiff in operating its railway on a city street; on the ground that the company having acquired that right by grant from the State, the city could not, under color of regulating the use of the street, obstruct or prohibit its exercise. Said the court:—

"Regulation cannot be enlarged into a power of prohibition, nor under it can the city usurp the State power of creating franchises or taking them away. If it has such power of creation or withdrawal, independently of the power of regulation and control, the grant of it is as to this plaintiff company, null and void. The plaintiff company can be deprived of its right to use any or all the streets only by its own consent, express or implied."

Other cases, cited in our brief, sustain the views above presented. It is respectfully submitted that the final judgment below was rendered under circumstances which perhaps precluded the court from giving due weight to these considerations. As the record shows,[2] the opinion on file was rendered after the argument of relator's demurrer to respondent's return. The city ordinance in question was only in part set forth in that return; besides which, the new matter averred in relator's reply, which respondents' demurrer admitted to be true, materially changed the aspect of the case. But the court, without further argument, rendered final judgment "for the reasons heretofore given in the opinion in this cause."

[1] 53 Fed. Rep. 715, 732.

[2] Pr. Rec., p. 40; *supra*, pp. 2, 29.

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But this opinion, while assuming the validity of relator's charter, does not discuss the vital question, whether the ordinance relied on, in virtue of the power to regulate the streets and the police power, did not transcend the admitted constitutional limits of those powers; nor whether the Assembly had not by said ordinance attempted to delegate to the Board of Public Improvements the powers which itself alone could exercise, and only by ordinance; nor whether the method of laying its wires, proposed by relator, did not fulfill, not only the condition prescribed by the State, but all that the city had lawful right to demand; nor whether the tax imposed by said ordinance was a reasonable or lawful condition of the exercise by relator of its corporate franchise. All these questions arose on the averments in relator's reply, but they do not appear to have been fully considered by the court below.

The opinion states, without qualification,[1] that — "The art of producing light by electricity was wholly unknown to science at the time the franchise was granted to relator." Hence it is inferred that, conceding that under the general words used in its charter relator is authorized to use electricity for lighting purposes, yet it does not follow that it has the right "to adopt its own methods for exercising that power, regardless of the paramount rights of the public to the use of the streets."

The court below, in adhering to this position, would seem to have overlooked the express averment in relator's reply,[2] admitted by respondents' demurrer to be true, that before March 2, 1857, electricity had been used for illuminating purposes and the electric light publicly exhibited to great numbers of persons. It may be assumed, perhaps, that on more mature consideration, and by availing itself of the methods of refreshing the judicial memory

[1] *Supra*, p. 33: Pr. Rec., pp. 42–3. [2] *Supra*, p. 27: Pr. Rec., p. 58

suggested by this Court in *Brown* v. *Piper*,[1] cited and approved by the court below in *State* v. *Hayes*,[2] a different conclusion might have been reached.[3] Moreover, the charter grant of power, not only to use for lighting purposes "any substance or material that may be now or hereafter used as a substitute" for gas or gas light, but also "*to that end*, to establish and lay down *all pipes, fixtures or other thing properly required therefor*," certainly must be held to entitle relator, if it may use electricity instead of gas for lighting purposes, to lay pipes or conduits for electric wires as well as for gas pipes, provided always, of course, "the same be done with as much dispatch and as little inconvenience to the public as possible."

We respectfully submit that the general words of the charter admit of no distinction between the two; nor is there any reason, so far as the safety of the public or the use of the streets is concerned, why any such distinction should be made. On the contrary, it is matter of common knowledge, it is expressly averred by relator, admitted by respondents, and assumed by the Court below, that the notorious danger attending the use of overhead electric wires would be entirely avoided by placing them underground. The opinion itself states:—

"It is a matter of public notoriety that the question is now being considered whether it would not be necessary in the interest of public safety as well as convenience that these wires should be placed underground, so as to thereby leave the streets safe and unobstructed."

For that reason, in part, relator's petition avers that it desires to exercise its corporate franchise of placing these wires underground, thereby dispensing with the overhead wires by means of which, under contract with the city of St. Louis, it is now lighting the public streets.

[1] 91 U. S. 37. [2] 78 Mo. 318. [3] *Supra*, pp. 98–100.

It is suggested by the court below [1] that there may be other companies now using electric wires for lighting and other purposes: and that,

"To accommodate them all, to prevent monopolies and to regulate the use of the streets, it seems absolutely necessary that the municipal authorities should have the right to direct the manner in which wires should be placed underground."

No such averment by the City of St. Louis or its Street Commissioner appears in this record. It will hardly be contended that the City of St. Louis could lawfully deprive relator of corporate franchises secured to it by an inviolable contract of the State, in order to accommodate other companies desiring like privileges.

As was held by this Court in *Louisville Gas Co.* v. *Citizens G. L. Co.*,[2] the propriety of making that contract, under the circumstances then existing, "was a matter for legislative determination, behind which the courts should not attempt to go." But this record presents no question of monopoly or exclusive right, and relator's averment as to the manner in which it proposes to lay its wires underground, in a space thirty inches wide, is a sufficient answer to any such suggestion.

It was contended by respondents' counsel below, and the suggestion appears to have made some impression on the court,[3] that relator, in virtue of the authority granted to it by Section 1 of the Act of March 26, 1868,[4] to lease or dispose of any portion of its franchises to other individuals or corporations, could practically control the streets and deprive the city of the power to regulate their use.

[1] Opinion, *supra*, p. 35: Pr. Rec., p. 44.
[2] 115 U. S. 698–9.
[3] Opinion, *supra*, p. 35: Pr. Rec., p. 44.
[4] *Supra*, p. 7: Pr. Rec., p. 7.

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This contention amounts simply to a denial of the validity, or the expediency, or both, of the grant to relator of the right to assign its franchises. But if the legislature had power to grant, and did grant those franchises to relator, its power to make them assignable cannot be denied. The expediency, under the circumstances existing at the date of the charter, either of granting such franchises or of permitting them to be subsequently assigned, was (as held by this Court in *Louisville Gas Co.* v. *Citizens' G. L. Co.*),[1] "a matter for legislative determination, behind which the courts should not attempt to go." Any assignee of those franchises would necessarily take them subject to every condition and obligation under which the relator held them, express or implied, whether contained in the charter or arising from the nature of the *quasi*-public duties to be fulfilled thereunder. The assignee would simply stand in the shoes of the relator, and no assignment could in any manner imperil the rights, the convenience or the safety of the public.

But such a contention would not be warranted either by anything in the record or by any fact outside of it. The refusal of the city and its Street Commissioner to permit relator to exercise its charter rights, was not based on any such ground, and the decision of the court below [2] was based exclusively upon relator's not having complied with the requirements of the ordinance set out in the pleadings. It is not claimed that relator has in any manner disposed of or parted with, or has any purpose of parting with, any part of its franchises. The purpose of this proceeding, on the contrary, is to enforce its own right to exercise them under and in accordance with its grant from the State, by laying under a very small portion of the streets in the most approved and practicable manner, the wires which it desires to use for carrying on its own lighting business.

[1] 115 U. S. 698–9.

[2] *Supra*, p. 35: Pr. Rec., p. 44.

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The only questions before this Court are, whether relator possesses the charter rights which it claims, and if it does, whether the city of St. Louis, on the pretext that it desires to promote the public safety and convenience, can lawfully prevent relator from exercising those rights in a manner which, as admitted on this record, will avoid not only all obstruction to travel and traffic, but also the dangers attending the method of electric lighting which relator is now using and is under obligation to use, by contract with the City of St. Louis itself.

XI.

Relator having applied to the Street Commissioner of the City of St. Louis for a permit to excavate Broadway, in pursuance of its charter rights, in order to do the same with as much dispatch and as little inconvenience to the public as possible, it was his duty to grant such permit; which being refused, mandamus is the proper remedy.

Neither in the pleadings nor in the argument below was any question made of the propriety of this proceeding for the purpose intended. If there were occasion to remind this Court of the office of the writ of *mandamus*, pertinent authorities on that point are cited in our brief.[1] The respondent Murphy, as Street Commissioner of the City of St. Louis, is a ministerial officer, charged by the charter of St. Louis with the supervision and control of the streets. By ordinance, no excavation can be made in any street except upon a written permit from him. Relator applied for such permit, in order to comply with the condition of its charter, that it should exercise the franchise in question "with as much dispatch and as little inconvenience to the

[1] *Supra*, p. 48.

public as possible." Assuming that relator possesses the charter rights it claims, it was the duty of the Street Commissioner to grant such permit; which being refused, *mandamus* is the proper remedy.

St. Louis Charter, Article IV, Sec. 35 (II Rev. Stat. Mo., 1889, p. 2109);
Rev. Ord. St. Louis (1887), Art. I, Chap. 15, Sec. 568;[1]
High, Extr. Legal Remedies, Sec. 324;
1 Dillon Mun. Corp., §§ 827–8;
State *ex rel. v.* State Board of Health, 103 Mo. 29;
State *ex rel. v.* Tracy, 94 Mo. 217.

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[1] *Supra*, p. 9.